The real tragedy of the commons
the absence of suitable institutions in English law to secure mutual self-interest commons

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The Real Tragedy of the Commons: The Absence of Suitable Institutions in English Law to Secure Mutual Self-Interest Commons

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Dedicated to the memory of Eileen Burgess and Graham Pratt

ABSTRACT

The tragedy of the commons thesis is used to discredit the viability of communal property. However, contrary to that thesis, communal property, and the mutual self-interest common specifically, is in fact an important species of property that English law should facilitate. To that end, this project establishes that the real tragedy of the commons is the absence of suitable institutions that can be used to secure mutual self-interest commons in English law.

This project continues and extends a study undertaken by Clarke in 2006 (*Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework* (2006) 59(1) *Current Legal Problems* 319). In that study, Clarke considered the strengths and weaknesses of using the trust, company, commons registration and village green registration as methods of securing mutual self-interest commons. This project expands the analysis of those legal institutions and also considers the use of unincorporated associations, co-operative and community benefit societies and planning law.

By drawing on commons scholarship, eight key characteristics of a mutual self-interest common are identified. Each legal institution is then tested against the eight characteristics to assess the degree to which those characteristics are exhibited. The conclusion of this project is that none of the institutions tested exhibit the eight characteristics to a satisfactory degree, and English law does not adequately facilitate mutual self-interest commons.

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Chapter 1 | INTRODUCTION

This project examines institutions available in English law to determine whether they facilitate the existence of common-property and, more specifically, mutual self-interest commons. At present, English law does not permit communities to hold legal title to land; only legal entities may hold title to land, and a community is not a legal entity. Instead, either communities enjoy enforceable rights over land, or individual community members enjoy rights in common (a phenomenon labelled as the 'class action concept of collective rights').[1] In both of these scenarios there must be an underlying legal entity that holds the title to the land. These underlying legal entities are often, but not always, artificial in that they are constructed solely for the purpose of holding title to the land over which the community exercises its rights.

The institutions examined in this project are considered through the lens of the desire to secure shared amenity space for communities. Community entitlement to land is a pressing issue in the twenty-first century. Land is a finite and increasingly scarce resource, and the government's pursuit of high-density house-building in urban areas[2] leaves communities vulnerable to the loss of their amenity space. It is imperative to understand the extent to which community entitlement to land is at present facilitated in English law to ensure that amenity spaces, such as open land and recreation areas, are protected for continued community use.

In 2006, Professor Alison Clarke made a major contribution towards assessing the facilitation of communal property in English law.[3] In her paper, Clarke argued that that the legal mechanisms available for the governance of communal property in English law are inappropriate. She examined some of the underlying legal entities, or

[1] See M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218, where it is argued that if a collection of individuals holds property rights that are substantially similar, and which are exercised in common with the other right holders, the community itself does not hold the right. Rather, the community is comprised of a number of similarly situated individuals, and is merely a 'convenient device for advancing the multiple discrete and severable interests of similarly interested individuals'.
[2] Department for Communities and Local Government, *Fixing our Broken Housing Market* (February 2017) 32.
[3] 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319.

'ownership vehicles',[4] that can be used to give effect to communal resource holding. In particular she considered the trust, the company and the commonhold. Clarke's closing remark was that

> [l]egal rules have the potential to both facilitate and discourage the development of successful commons. We need to look more closely at our legal institutions to ensure they are doing the former and not the latter.[5]

This project answers that call and examines our legal institutions to determine whether they are facilitating or discouraging the development of successful commons.

Critics of this project will argue that, pursuant to the 'tragedy of the commons' thesis, common-property institutions are inherently problematic and that a legal system should always prefer rights to be held individually as opposed to collectively. As such, the point of departure for this project is to establish four things. First, the tragedy the commons thesis is flawed and common-property is in fact an important species of property; second, in consequence, English law should facilitate common-property; third, which type of common-property should be facilitated; and fourth, a metric by which the satisfactoriness of the institutions giving effect to common-property regimes can be measured. Once these propositions have been established, the remainder of the project focuses on assessing the institutions that may be used to give effect to common-property regimes against the metric identified.

I. THE TRAGEDY OF THE COMMONS

The tragedy of the commons thesis is a well-trodden debate. Initially posited by Hardin,[6] and later developed more rigorously from an economic perspective by Demsetz,[7] the crux of the thesis is that finite or scarce communal resources will inevitably be destroyed as a result of over-exploitation and under-maintenance. A person who uses a communal resource will tend to over exploit the resource in the knowledge that he will gain the full value of his use, and that the costs of his use will

[4] Clarke n3 350.
[5] Clarke n3 357.
[6] (1968) 162 *Science* 1243.
[7] 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347.

be borne by all members of the community with communal rights. Similarly, a person has little incentive to invest in the maintenance of a communal resource as in doing so they bear the entirety of the cost, and yet the benefit of their expenditure would be shared amongst all members of the community. The consequence is that the resource is over-exploited and under-maintained, leading to its depletion and eventual destruction.

Private ownership of scarce and finite resources is presented as the way of averting the tragedy of the commons, and is advocated by both Hardin and Demsetz. The argument is that private ownership of land internalises many of the external costs associated with commons; a private owner is free to realise the full value of his investment in the land by virtue of his ability to exclude others, and is incentivised to use the resource more efficiently given that he will bear the full costs of not doing so.[8] Consequently, according to the tragedy of the commons thesis, private ownership of scarce and finite resources is the most efficient way of managing those resources, and will prevent their depletion and destruction.

However, the flaws and criticisms of the tragedy of the commons thesis are almost as well-trodden as the thesis itself. Many of the criticisms follow the same broad theme that Hardin and Demsetz over-simplify the thesis in their argument for private ownership,[9] and it is now frequently argued that the decline of the commons was less to do with inefficiency, and more to do with a complex combination of political, social and technological developments.[10] For example, Field argues that population growth plays a key role in the transition between property-holding arrangements.[11]

The positive case for commons

Running parallel to the flaws in the tragedy of the commons thesis is the positive case that can be advanced in favour of common-property. For example, notwithstanding

[8] Ibid 356.
[9] The criticism is especially levelled at Demsetz, who fails to consider state ownership as an alternative to private property, even though Hardin himself acknowledged that state ownership could provide a solution to the tragedy. See J Grunebaum, *Private Ownership* (Routledge and Kegan Paul 1987) 158-167.
[10] See Clarke n3 324-325 for references to works making such arguments.
[11] B Field, 'The Evolution of Property Rights' (1981) 42 *KYKLOS* 319.

Demsetz's economic analysis, an economic analysis can in fact be used to suggest that common-property regimes may, in some circumstances, be the most efficient property regime. To that end, Field argues that when the cost of excluding third parties from a resource is proportionately higher than the cost of governing multiple parties' use of the resource, the most efficient outcome is to adopt a common-property regime. [12]

Furthermore, empirical studies [13] also demonstrate that commons are particularly successful in high-risk environments, where they operate as an effective mechanism for spreading risk. [14] Where a resource is communal, a single individual will not bear the entire cost of a harsh winter, disease or natural disaster; instead, the costs will be borne proportionately amongst the users of the resource, and no individual should face complete ruin upon the occurrence of such events. [15] Examples of risk-spreading commons that are often cited include the medieval open field system,[16] the summer mountain pastures of historical Iceland,[17] and village grazing lands in the Swiss Alps.[18]

The empirical studies referenced above demonstrate that commons are 'not a relic of past or primitive societies'. [19] On the contrary, it is the continued existence of communal land use that makes this project important; new de facto commons continue to arise, yet it is not clear whether our legal institutions facilitate and protect, or instead discourage, successful commons. New commons will probably take a different form from their historic counterparts; land use practices have changed in England and it is unlikely that newly arising commons will be concerned with grazing and agricultural use. Instead, modern commons are more likely to be concerned with the provision of open spaces for the purpose of recreation. That assertion is made for two primary reasons. First, the government favours a programme of high-density house building, especially in urban areas, to make the most efficient use of land in meeting the current

[12] Ibid.
[13] See Clarke n3 325 and fn12 for examples of such studies.
[14] R Ellickson, 'Property in Land' (1993) 102 *Yale Law Journal* 1315, 1341-1344.
[15] Ellickson (ibid) also argues that this justification is likely to hold true until the development of other insurance mechanisms to guard against loss.
[16] Field n11.
[17] T Eggertsson, 'Open Access Versus Common Property' in TL Anderson and FS McChesney (eds), *Property Rights: Cooperation, Conflict and Law* (Princeton University Press 2003).
[18] E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press 1990).
[19] Clarke n3 325.

housing need.[20] Maximising housing density in this way is likely to be at the expense of the private amenity space attached to each housing unit. As such, urban areas will experience an increase in population, a decline in private amenity space, and a consequent increase in demand for communal amenity spaces. Second, the decline in rural communities and economies means that there is a reduced demand for communal grazing and agricultural land. Therefore, it is foreseeable that fewer commons of a traditional nature will arise or continue to be used, and that there will be an increased demand for commons of a different nature as the population gravitates towards urban areas.

These modern urban commons, generated by a growing population and decreasing resource pool, resonate strongly with the economic arguments offered above. Communities deprived of amenity space will likely go to great lengths to use the few spaces available to them in the built environment. Consequently, the cost of attempting to exclude communities from those spaces would probably be disproportionately higher than the costs of allowing use of the resource and installing a governance regime. As such, where these conditions prevail, urban commons are most efficiently managed as a common, as opposed to private, property regime.

Conclusion

The tragedy of the commons thesis does not present a compelling case for the undesirability of the commons and the superiority of private property in all circumstances. Instead, some communal resources can be, and are, managed in a 'non-tragic' way. As such common-property regimes have an important role in the use and management of resources, especially in emerging urban commons, even if those regimes occupy only a small space on the property spectrum.[21] Consequently, it is important to consider the legal institutions available in English law and assess whether they facilitate the commons, as their protection should not be neglected.

[20] Department for Communities and Local Government n2 32.
[21] Ellickson n14.

II. DEFINING THE 'COMMONS'

Two preliminary points must be made when defining the commons. First, references to 'communal' or 'common-property' (the terms are used interchangeably) in the scholarship are not a reference to the resource itself,[22] but instead the property rights that exist over the resource. As such, communal or common-property does not exist per se: rather, there exist resources that are 'controlled and managed as common property'.[23] Second, caution must be urged. 'Commons', is a generic term used to refer to all types of common-property, of which there at least three: no-property, open-access and limited-access.[24] The indiscriminate use of the term is problematic; the solution to the over-use problem may vary between each type or regime, and the interchangeable use of language to describe different circumstances and legal relations impedes progress in understanding these concepts.[25] As will become apparent, this project is concerned with only a narrow type of limited-access common, known as the mutual self-interest common.

To define the commons, it must be understood that property regimes exist on a spectrum. At one end of the spectrum is individual private ownership, in which one legal person holds the rights and powers of an owner. The middle space of the spectrum is occupied, in descending order, by limited-access commons, open-access commons and state property. At the other end of spectrum exist no-property regimes, in which no person holds the rights and powers of an owner. The term 'commons' is generally used to refer to all property regimes that do not comprise individual private ownership.

Property regimes

The right to exclude others is an, if not the most, important characteristic of property rights,[26] and is the hallmark of the traditional Blackstonian concept of property.[27]

[22] Some scholars, particularly Ostrom, also choose to use the term 'common-pool resource' as a synonym for communal or common-property.
[23] DW Bromley (ed), 'Commons, Property and Common-Property Regimes', in *Making the Commons Work: Theory, Practice and Reality* (San Francisco: Institute for Contemporary Studies 1992) 4.
[24] Clarke n3.
[25] Bromley n23 3.
[26] C Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc. 1994) see chapter one generally.
[27] Sir W Blackstone, *Commentaries on the Laws of England* (Chicago University Press 1979) 2.

However, that view is somewhat antiquated and cannot account for all species of property in modern society. Instead, the modern popular starting-point when analysing property rights and regimes are the works of Hohfeld [28] and Honoré, [29] known collectively as the 'bundle of rights' theory. Hohfeld analysed property rights as bilateral legal relationships between people. He identified four types of entitlement: rights, privileges, powers and immunities. Each entitlement has a correlative: duty, no-right, liability and disability (respectively). Additionally, each entitlement has an opposite: no-right, duty, disability and liability (respectively). For example, the right to exclude others and not be excluded (Blackstone's traditional mark of a property right) correlates to a duty of non-interference imposed on all others, and is the opposite of having no-right to exclude or not be excluded.

Honoré's analysis focuses on the incidents of ownership enjoyed by an owner, as opposed to bi-party jural relations. He presents eleven incidents of ownership: the rights to possess, use, manage, income, capital, transmissibility, security, residuarity, absence of term, the prohibition of harmful use, and the liability to execution. Whilst Honoré labels many of his incidents as rights, only the first incident, the right to possession, is a right in the Hohfeldian sense: it entails the right to be put in possession and the correlate duty that others not interfere with that possession. [30] The other incidents are a collection of powers and privileges, as well as an immunity and a liability. Honoré states that the incidents are not individually necessary to give rise to ownership,[31] but also declines to suggest which incidents, or which combination of incidents, is sufficient. However, more recent scholarship critiquing the contributions made by Honoré and Hohfeld suggests that property regimes, or private property regimes at least, rely on the ability to exclude those without use rights over the resource and the power to alienate.[32]

Hohfeld and Honoré's analyses are conducted against the backdrop of rationalising private as opposed to common-property. Nonetheless, they are useful for the definition

[28] WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16.
[29] AM Honoré 'Ownership' in AG Guest, *Oxford Essays in Jurisprudence* (Oxford University Press 1961).
[30] Ibid 113.
[31] Ibid 112-113.
[32] J Penner, 'The 'Bundle of Rights' Picture of Property' (1996) 43 *UCLA Law Review* 711.

of common-property, as they can be used to chart the differences in the rights and legal relations between parties in different property regimes. Contrasting regimes in that way enables a better understanding, and precise definition of, the various common-property regimes.

Individual private ownership

In individual private ownership, Hohfeldian entitlements are held and enjoyed by a single legal person. In particular, individual private ownership hinges on the Hohfeldian right-duty correlate: one person enjoys the right to exclude all others from the resource and the right not to be excluded, which imposes upon others an unqualified duty of non-interference. Additionally, one person enjoys a privilege to use the resource, and others have no right to prevent that use.

Similarly, the incidents of ownership are vested in one individual. Whilst it is still unclear which incidents are necessary and sufficient to give rise to private ownership, if exclusory and alienation powers are taken as the core of the bundle of rights, private ownership confers these powers. Unless an owner contracts out of these powers, or legitimate state regulation limits them, a private owner is entitled to be in, and stay in, possession of their property and alienate it as they wish.

Limited-access commons

In a limited-access common, Hohfeldian entitlements, and any incidents of ownership, are jointly held by members of a community. Limited-access commons also hinge on the Hohfeldian right-duty correlate. Members of a community enjoy both the right to exclude non-members from the resource and a right not to be excluded, which in turn imposes upon non-members an unqualified duty of non-interference. Additionally, community members enjoy a privilege to use the resource, and non-members have no-right to prevent that use. Rose observes that a limited-access common bears some resemblance to private ownership, in that only select persons have any right to the resource,[33] and even goes so far as to suggest that it is 'commons on the inside, [private]

[33] Rose n26 117.

property on the outside'.[34] Rose's position is supported by other property scholars, such as Harris, who asserts that 'joint, group and (non-public) corporate property are all variations of private property' that benefit from the protection of trespassory rules excluding outsiders from the resource.[35] Consequently, limited-access commons can be described as communal private ownership.

Any incidents of ownership present in a limited-access common are also held jointly by members of a community. However, communal private ownership must fall behind individual private ownership on the property regime spectrum, as group ownership carries no individual powers of testation.[36] As such, the incidence of transmissibility is restricted in a limited-access common, as it may only be exercised collectively as opposed to individually. The restriction of that incidence is a key distinguishing feature between individual private property and limited-access common-property (and indeed all other common-property regimes). In Hohfeldian terms, community members have no power to alienate the resource and, as such, suffer from a disability; the same is only true of individual private property if the individual owner has contracted out of that power, or if that power is subject to legitimate state regulation.

As limited-access commons share many features with individual private ownership, it is arguable that the tragedy of the commons is not in fact inevitable in such a property regime. Indeed, the tragedy of the commons is only inevitable in a limited-access common where the use of the resource by the community is unregulated, leading to the over-exploitation of the resource. However, it is difficult to envisage a limited-access common that is wholly unregulated, for two reasons. First, vesting exclusion rights in a community presupposes the existence of an organised community aware of its rights and the need to exclude others, which in turn suggests some level of regulation.[37] Second, it is likely that, as the pool of persons entitled to exercise exclusory rights and use privileges is limited, collective decision-making regarding the regulation of the resource would be possible.

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[34] C Rose, 'The Several Futures of Property: of Cyberspace and Folk Tales, Emission Trades and Ecosystems' (1998) 83 *Minnesota Law Review* 129, 155.
[35] JW Harris, *Property and Justice* (Oxford University Press 1996) 100-104.
[36] Ibid 102.
[37] Clarke n3 323.

The regulation of limited-access commons generates a distinction between two sub-species such commons: those subject to external regulation (such as by the government, state agencies or non-government organisations), and those that are self-governed, which are known as 'mutual self-interest commons'.[38] A common may be externally regulated if there is some public interest in the resource. On the contrary, mutual self-interest commons are only intended to deliver a benefit to the members of a specific community, and as such are governed by the community itself. To that end, Rose's observation regarding the similarities between a limited-access common and individual private property must be refined; it is the mutual self-interest common that shares the key features of individual private property, including that of self-governance.

Open-access commons

In an open-access common, Hohfeldian entitlements, and any incidents of ownership, are jointly held by all persons generally. Whilst also engaging a right-duty correlate, the rights enjoyed by the public in an open-access regime differ from those enjoyed in individual and communal private ownership. For example, in an open-access regime every person has a Hohfeldian right not to be excluded from the resource, which imposes the correlative duty of non-interference, where that interference would amount to exclusion. However, every person has no-right to exclude others from the resource, as all have a privilege to use, which is protected indirectly through the qualified duty of non-interference.[39] As such, the feature that distinguishes open-access commons from individual private property and limited-access commons is the absence of the right to exclude. Rose equates open-access regimes with the use rights of the 'unorganised public',[40] the paradigm case of such a property regime being that which exists over a public right of way.

Any incidents of ownership present in an open-access common are also held jointly by all persons generally. As with limited-access commons, there is no incidence of transmissibility, distinguishing open-access commons from individual private

[38] Clarke n3 324.
[39] Douglas and McFarlane, 'Defining Property Rights' in J Penner and H Smith (eds) *Philosophical Foundations of Property Law* (Oxford University Press 2013).
[40] Rose n26 117.

ownership. However, as exclusory rights are also absent in an open-access regime, the open-access common is the first point on the spectrum that both of the rights at the core of the bundle of rights theory are missing. In turn, that suggests that the open-access regime is the first regime when descending the spectrum that lacks the key components of a successful property regime.

Clarke argues that in an open-access regime the tragedy of the commons is only inevitable if the resource is scarce and unregulated.[41] However, it is unlikely that there would ever be a complete absence of regulation in an open-access regime; the fact that there is a duty of non-interference imposed upon all others presupposes that there is already a regulatory regime in existence. However, in contrast to limited-access regimes, the source of the regulation in an open-access common is most likely the state, as opposed to the pool of persons that use the resource. As the resource is available to all, the pool of users is probably too large to allow for collective decision-making. Therefore, open-access resources are not self-governed by the users, further distinguishing these regimes from both individual private ownership and mutual self-interest commons.

State ownership

In state ownership, some Hohfeldian entitlements are held by the state, which also holds legal title to the resource, and other entitlements are held jointly by all private citizens. In particular, it is the state that enjoys the right to exclude others and who may enforce duties of non-interference; there is no right of exclusion enjoyed by non-state parties. Additionally, private citizens jointly enjoy the privilege to use the resource, protected by qualified duties of non-interference, and others have no-right to prevent that use.

Whilst the state may enjoy exclusory rights over the resource, the state does not itself enjoy the Hohfeldian privilege to use the resource for its own benefit, nor does it hold Honoré's incidence of use. Consequently, Harris argues that, whilst state ownership is

[41] Clarke n3 323.

a property regime, it cannot be properly described as 'ownership'.[42] According to Harris, only regimes that enable the titleholder to use the resource for self-seeking exploitation can be described as ownership. Therefore, whilst the state 'owns' the resource in so far as it holds legal title to the resource, it does not have ownership in any meaningful sense, and the use value in the resource is enjoyed by the public generally.

No-property

In a no-property regime everyone in the world has a Hohfeldian privilege to use the resource, also protected by qualified duties of non-interference, with no-right to exclude the use of all others who enjoy that privilege. Resources subject to a no-property regime include Hardin's example of the atmosphere, which all persons are free to pollute, the high seas, which all persons are free to fish, and other non-scarce natural resources (especially those of very little value), such as Clarke's example of leaves falling from trees in the autumn.[43] No-property regimes do not only exist over natural resources; other examples include free information services (like newspapers) and television signals.[44]

Avoiding the tragedy of the commons in a no-property regime requires different action than the other types of common. Clarke argues that the tragedy of the commons is inevitable in a no-property regime once the resource becomes scarce and that *any* regime of property rights, not just private property rights, has the potential to avert the tragedy.[45] What really matters is how well any given property regime copes with the allocation of the costs and benefits of managing and governing a particular resource. That argument is well established in the commons scholarship, having previously been developed by Ostrom,[46] and echoes Grunebaum's criticisms of Hardin for not considering state ownership as a method of averting the tragedy of the commons.[47]

[42] Harris n35 105.
[43] Clarke n3 322.
[44] *Hunter v Canary Wharf* [1997] AC 655.
[45] Clarke n3 322.
[46] E Ostrom, 'The Rudiments of a Theory of the Origins, Survival and Performance of Common-Property Institutions', in DW Bromley (ed), *Making the Commons Work: Theory, Practice and Policy* (San Francisco: Institute for Contemporary Studies 1992) 293.
[47] J Grunebaum n9 158-167.

III. MUTUAL SELF-INTEREST COMMONS

The scope of this project is limited to a consideration of mutual self-interest commons[48] for the purposes of providing community amenity space. This limitation is adopted for four reasons.

First, the mutual self-interest common is the type of common most likely to be successful and avoid the tragedy of the commons thesis. Specifically, the mutual self-interest common, whilst being communal in nature, shares features of individual private ownership, which is typically considered the most successful and efficient property regime, notwithstanding evidence to the contrary. Those features include features of self-governance and exclusory rights in favour of the users of the resource. Therefore, having established that common-property regimes are in fact desirable in some circumstances, and that mutual self-interest commons enjoy an increased likelihood of success, it is reasonable to pursue institutions that best facilitate that type of common.

Second, commons that provide amenity space for communities are also less likely to fall foul of the tragedy of the commons thesis than those commons used for traditional agricultural or sustenance purposes. Those using land for recreation usually enjoy a non-subtractive benefit from the land which, when compared to subtractive benefits such as the taking of the natural produce of the land, is less likely to exhaust the land and cause the destruction of the resource. Only where recreational activity involves taking the produce of the land, or where overuse causes physical damage to the land, does the risk of exhaustion of the resource really exist. Furthermore, for recreational use to exhaust a resource, it is likely that a far greater level of use is required than if the use was of a subtractive nature. Therefore, in light of the importance of communal amenity space already highlighted in this chapter, and as resources are able to better tolerate communal recreational use than subtractive use before the tragedy of the commons thesis becomes an issue, it is reasonable to pursue institutions that best facilitate that type of common.

[48] Clarke's 2006 project was similarly limited.

Third, as mutual self-interest commons serve the interests of a community, they are as close as English law gets to recognising community ownership. Other types of common, especially open-access commons, are already facilitated by English law. For example, land held by a local authority pursuant to the section 10 of the Open Spaces Act 1906 is available to the public as an open space. As such, an inquiry into English law's facilitation of open-access commons is less valuable than an inquiry into mutual self-interest commons, as it is beyond doubt that English law already provides for open-access regimes.

Fourth, conducting this project through the lens of community amenity space accords with the argument presented above that modern commons are most likely to be urban commons concerned with the provision of community amenity and recreation space, and which arise in response to the decline of private amenity space brought about by a policy of high-density house building.

Mutual self-interest commons: defining the community

As it is the members of a community that enjoy exclusory rights and use privileges, and engage in self-regulation in a mutual self-interest common, the first step when conducting the proposed inquiry is to define the term 'community'.

The wider commons scholarship labels individuals who use and obtain a benefit from a communal resource as 'appropriators'.[49] Where those appropriators come together in an organised fashion, they are known as an 'appropriator organisation'. Ostrom suggests that appropriators should be considered organised when they share a common understanding about who is and is not a member, the rights conveyed over the resource by membership of the appropriator organisation, how decisions will be made regarding the use and management of the resource, and how conflicts over the use of the resource will be resolved.[50] This project adopts the position that the 'community' served by a mutual self-interest commons is equivalent to an 'appropriator organisation', and that is how the term shall be used.

[49] Ostrom n46 297.
[50] Ibid.

It is clear from Ostrom's definition that appropriator organisations are a largely subjective construct, relying on the shared understanding of the members of the organisation. Ostrom is not alone in presenting a subjective account of appropriator organisations. McDonald presents the view that the law does not create communities, and that they are not legal fictions. Instead, it is the shared understanding amongst individuals on matters concerning life within the community, such as membership and decision-making, that creates a community.[51] Furthermore, McDonald argues that the shared understanding of the community aids its function as a right holder.[52] For a group to function as a right holder, members must consider themselves normatively bound to one another to the extent that they should not act for their own self-interest, but in pursuit of effectuating their shared understanding.

However, the existence of a community cannot be determined by subjective factors alone. Left as a purely subjective construct, a community is completely amorphous, and it will be difficult, if not impossible, for those from outside the community to identify community members who benefit from the mutual self-interest common. It is of great importance that third parties are able to identify the community members who hold rights over the resource, as is it to them whom all others owe the duty of non-interference. Therefore, in the interest of certainty and clarity, the definition of community cannot rely solely on subjective factors.

Accordingly, there must be some objective factors that give rise to the existence of a community and allow third parties to identify its members. To that end, McDonald concedes that objective factors such as shared heritage, language, belief or social condition will often positively correlate to shared understanding, and provide a focus for that understanding.[53] However, McDonald stops short of accepting that objective factors alone can identify a community. In addition, Ostrom herself also points to some objective factors that are conducive to the emergence and identification of appropriator organisations. Drawing on the work of other authors, she identifies that variables relating to the resource, demand and supply and the appropriators themselves all inform the emergence of appropriator organisations. Specifically, she lists five objective

[51] McDonald n1 219.
[52] Ibid 218-219.
[53] Ibid.

factors: the number of appropriators, their propinquity to the resource, their homogeneity, the existing level of organisation, the certainty of the appropriator's rights, and the absence of control by centralised government.

Therefore, whilst this project equates Ostrom's definition of appropriator organisations with that of a community, it is necessary to include an objective limb into that definition. Of the factors listed by Ostrom, two appear to be of a wholly objective nature, and would likely aid third parties in identifying the members of a community: the number of appropriators and their propinquity to the resource. Specifically, Ostrom states that the number of appropriators must be sufficiently small so that the costs of decision-making and communication are low.[54] Ostrom must be correct in that assertion, for at least two reasons. First, as a mutual self-interest common is a type of limited-access common it should, by definition, only deliver a benefit to a limited group of persons. If the group of persons benefitting from the resource were too large, the resource could be considered as available to the general public, which would in fact make it open-access. Second, studies, such as those earlier referred to by Field,[55] demonstrate that private property regimes emerge when the costs of exclusion are lower than the cost of governance. As such, a mutual self-interest common will only be viable where the community is small enough that the costs of governance do not exceed, or at least are not disproportionate to, the cost of exclusion. Similarly, Ostrom must be correct when pointing to propinquity as an objective community factor. A small group proximate to the resource will likely have a strong positive correlation to subjective factors. For example, it is likely that a small group located close to the resource will be of the same or similar demographic, share a common language or belief, and have shared past experiences with the resource. Clarke also views geographical proximity as a crucial feature of the community. She argues that in order for a mutual self-interest common to be successful, the community itself must be cohesive, and that cohesion 'entails or results from geographical proximity or isolation'.[56] Finally, it is also likely that defining a community in accordance with a geographical area will limit the size of the group, and prevent it from increasing indefinitely.

[54] Ostrom n46 299.
[55] n11.
[56] Clarke n3 330.

Therefore, the definition of a community for the purposes of this project is a small group of organised individuals, proximate the common resource and one another, who share a common understanding about who is and is not a member, the rights conveyed over the resource by membership of the community, how decisions will be made regarding the use and management of the resource, and how conflicts over the use of the resource will be resolved. Examples of such communities include the residents of a housing estate that use a green space for recreation, and the inhabitants of a rural village that use a field for grazing animals.

Community right-holding

As identified above, in a mutual self-interest common, Hohfeldian entitlements, and any incidents of ownership, are jointly held by the community members. In effect, it is the community itself that holds the rights over the mutual self-interest common. To that end, the shared understanding that defines the community aids its function as a right holder, as the members of the community must consider themselves as normatively bound to one another to perform that function.[57] As such, a community is more than a collection of individuals, and more than a device for advancing multiple discrete and severable interests (a phenomenon that McDonald labels the 'class action concept of collective rights').[58]

However, whilst the community holds the communal rights for the collective benefit, an individual can still invoke those rights. McDonald gives the example of a Canadian francophone who invokes the right that their child can attend a French School governed by French trustees.[59] The right invoked is collective and not individual, but that does not prevent an individual from within the community invoking it. An example that can be drawn from this project is that of town and village green rights, considered in chapter seven. The right to use a village green for the purposes of lawful sports and pastimes is held by the inhabitants of a locality or neighbourhood within a locality.[60] However, an individual inhabitant may invoke that collective right if their use of the land is

[57] McDonald n1 218-219, especially fn 6, citing the work of Honoré.
[58] McDonald n1 218-219. See also L Green, 'Two Views of Collective Rights' (1991) 4 *Canadian Journal of Law and Jurisprudence* 315, 319.
[59] McDonald n1 232.
[60] Commons Act 2006, s15.

interfered with, and it is not necessary for the other inhabitants to join in that action and invoke the right collectively.

Legal vs. social construct

It is accepted that the concept of a community outlined above is a legal construct. It is not suggested that there is a vast quantity of communities across the English jurisdiction currently meeting the definition. Instead, communities are often a social construct and the product of circumstance.

However, for community titleholding to be contemplated, communities must be organised into an identifiable and definable form, as right-holding depends on there being an identifiable right-holder. Therefore, before a community may be considered as a candidate for communal right-holding, it must first organise in such a way as to be recognised according to the definition outlined above. Only once organised into a legally identifiable group distinct from all others and the public at large it is possible to consider how a community may hold rights to a communal resource, and how those rights may be protected. Accordingly, communities that arise by way of circumstance and without conscious formation must first consider the relationship between its members, and organise to ensure that the community and its members meet both the objective and subjective limb of the community definition.

IV. FACILITATING MUTUAL SELF-INTEREST COMMONS

So far it has been established that the tragedy of the commons thesis is flawed and far from inevitable. On the contrary, efficient communal land use can and does exist, and is, in some instances, desirable. As such, it is important that English law provides institutions to facilitate the commons. The focus of this chapter now turns to the fourth question set out at the start of this chapter: establishing a metric by which the satisfactoriness of those legal institutions can be assessed.

Clarke draws on the commons literature and identifies six conditions that are likely to be propitious to a mutual self-interest common, all of which relate to the nature of the

community that uses the common resource.[61] Those characteristics are the exclusion of non-members, mutual self-interest, homogeneity of interest, community cohesion, idiosyncratic regulation, and sanctions for any breach of that regulation. In addition, this project identifies two further characteristics that emerge from the scholarship as being propitious to a mutual self-interest common: the inability to sever and alienate a discrete interest and entitlement to the communal resource, and the perpetual nature and intergenerational equality of the property regime.

Legal institutions that promote, or at least facilitate, these eight characteristics could be said to satisfactorily facilitate a mutual self-interest common. As such, these eight characteristics are the metric by which the satisfactoriness of the available legal institutions will be assessed. However, before doing so, the eight characteristics and their use as the yardstick must be justified.

Inalienability

It was earlier observed that a mutual self-interest common resembles individual private property. However, in so far as private property regimes are defined by the ability to exclude those without use rights and the power to alienate,[62] the mutual self-interest common differs from individual private ownership; community members enjoy no individual powers of transmissibility, and may only exercise that power and incidence of ownership collectively.

Eggertsson examined the rights of the user in both common-property and open-access regimes[63] (Eggertsson uses 'common-property' to refer to a limited-access common). Whilst he focuses on highlighting the differences between the communal rights enjoyed in open-access and limited-access common, his research highlights the nature of the rights enjoyed by the community in a limited-access common. As a starting point, Eggertsson adopts the spectrum of use rights put forward by Ostrom and Schlager.[64] Those rights are:

[61] Clarke n3 327-331.
[62] Penner n32. The powers of transmissibility and exclusion were also key features of Honoré's definition of ownership, see Honoré n29.
[63] Eggertsson n17.
[64] E Schlager and E Ostrom, 'Property-Rights Regimes and Natural Resources: A Conceptual Analysis' (1992) 68(3) *Land Economics* 249.

1. Authorised access to enjoy non-subtractive benefits
2. Right to withdraw resource units
3. Right to manage and improve the asset
4. Right to exclude others from entering and withdrawing resources
5. Right to sell or lease the asset

Eggertsson suggests that open-access regimes entitle users to the first two rights, whereas a limited-access regime entitles users to the first four.[65] Crucially, not even the users of a limited-access common are entitled to the fifth right, and this is what separates limited-access commons from individual private ownership.

Eggertsson's argument is that any regime that includes the power of alienation cannot be a limited-access common.[66] A literal reading of that argument suggests that title to the communal resource could never be transferred. However, it is suggested that the argument that Eggertsson seeks to make, and the inalienability characteristic itself, is actually more subtle and nuanced, and contains two limbs.

Alienations defeating communal rights

The first limb is not concerned with the alienation of the communal resource per se, but alienations that defeat the communal rights over the resource. It should be remembered that a community does not enjoy the status of a legal entity, and cannot hold title to land. Instead, an underlying owner must hold the title,[67] and the community enjoys rights over the resource. As such, there is nothing inherently objectionable in transferring the legal title to the resource, provided that the communal rights endure and survive the transfer. There is minimal value in prohibiting transfers of the legal title, as the identity of the underlying owner will often make little difference to the community. Instead efforts should be focused on ensuring that the rights enjoyed by

[65] Eggertsson n17 74.
[66] Ibid.
[67] The underlying owner may be a private owner, the state or an artificial entity created for the purposes of holding the legal title for the benefit of the community.

the community are stable and enduring, and that they can be enforced against both present and future owners of the land.

There are two further reasons why there should not be a complete prohibition on alienation. First, in some instances, alienations of the legal title may in fact be desirable. For example, allowing the underlying owner to transfer the title to the resource could ensure that the title falls to a more suitable owner. A private owner may be ill-equipped to manage the burden of their land being subject to communal use rights. By allowing its transfer, a more suitable owner, such as a public body with specific expertise, may come to hold title to the resource, and aid its preservation and management. Second, a complete prohibition on alienation would likely come under scrutiny for violating Article 1 of the First Protocol to the European Convention on Human Rights. Preventing the titleholder from realising their interest in the resource would need to be justified in light of the protection afforded by the Protocol.

Consequently, the inalienability characteristic should not be read as an outright prohibition on alienation of the legal title to the resource. Instead, the characteristic should be understood as incorporating a limb that prohibits only alienations that defeat the communal rights over the resource.

Severance and alienation of a discrete share

The second limb of the inalienability characteristic requires that community members are unable to sever and alienate a discrete entitlement or share of the resource. As argued earlier, communities are more than a collection of individuals with severable rights over a common resource. As such, communal property rights, unlike individual private property rights, do not entitle a member of the community to a discrete share in the resource; it is the community as a whole that enjoys entitlement to the resource, and any powers of alienation must be exercised collectively, not individually.

Allowing the severance and alienation of individual and discrete shares would facilitate the transferring of community rights to non-members of the community. Eggertsson

argues that allowing such transfers threatens the existence of the community,[68] and in turn undermines the principle that entitlement to a limited-access common is derived from status as a community member. Communal rights should only accrue to an individual upon joining the relevant community, and cease if the individual leaves.

Consequently, the inalienability characteristic should be understood as incorporating a limb that prevents a community member severing and alienating a discrete share of, or entitlement to, the resource. Community members' inability to sever and alienate such shares runs to the conceptual heart of a limited-access common, and is what distinguishes it from individual private ownership.

Perpetuity and intergenerational equality

The second characteristic of a mutual self-interest common is perpetuity and intergenerational equality. The inalienability characteristic ensures that the resource is available for future generations of community members. Therefore, one of the key characteristics of a mutual self-interest common is that there is an intergenerational equality of benefit[69] from the resource, which any legal institution used to secure a mutual self-interest must facilitate. Concern for future generations' ability to benefit from the common is evident across the commons scholarship. For example, Rodgers argues that the sustainable management of the commons[70] is motivated not only by the needs of the present commoners, but also by 'intergenerational equity and the need to preserve essential economic resources for future exploitation'.[71]

Furthermore, Ostrom argues that communities that successfully establish limited-access commons have an 'intricate web of connections among participants who share a past and expect to share a future.'[72] That expectation of sharing a future relies on the continued existence of both the resource itself and the limited-access property regime,

[68] Eggertsson n17 74-75.
[69] As a concept, intergenerational equality of benefit can be traced back to the World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987), also known as the 'Brundtland Report', concerning sustainable development.
[70] The term being used to refer to common land registered pursuant to either the Commons Registration Act 1965 or the Commons Act 2006.
[71] C Rodgers, 'Reversing the 'Tragedy' of the Commons? Sustainable management and the Commons Act 2006' (2010) 73(3) *Modern Law Review* 461, 464.
[72] A Margalit, 'Commons and Legality', in G Alexander and E Peñalver (eds), *Property and Community* (Oxford University Press 2010) 145; Ostrom n18.

giving rise to the perpetuity limb of the characteristic. If the resource is exhausted, or the rights over it destroyed, it would be impossible for future generations to benefit from the resource as past and present generations have.

Benefitting future generations is a feature that further distinguishes commons from individual private ownership. Private ownership predominantly focuses on the freedom of the present right holders; unless those right holders voluntarily undertake to preserve the capital of their property for future generations, there is no legal obligation to do so, notwithstanding common law attempts to introduce such duties.[73] Therefore, any legal institution used to give effect to a mutual self-interest common must protect the perpetual existence of the resource and the communal rights, which in turn secures an intergenerational equality of benefit for the community.

Exclusion of non-members

It was established earlier in this chapter that mutual self-interest commons share some features with individual private ownership. In particular community members enjoy the Hohfeldian right to exclude non-members of the community from the resource, and to not be excluded themselves, as well as the privilege to use the resource. Therefore, any legal institution used to secure a mutual self-interest common must enable the community to exclude all non-members from the resource.

Clarke also discusses the exclusion requirement. Drawing on the work of Ostrom, she considers that

> The tragedy of the commons is averted by communal holding only if the resource is controlled by a group which is small and cohesive enough to permit members, at a sufficiently low cost, to communicate between themselves and devise and enforce rules regulating their own use of the resource. But group control depends on being able to keep out non-members, or, what amounts to the same thing, on all resource users being subject to the social norms of the group regulating use.[74]

[73] See, for example, the dissenting judgment of Lord Denning MR in *Re Brocklehurst* [1978] Ch 14 in which his Lordship decided that the deceased's leasing of the shooting rights over his land, which devalued the estate to the detriment of his heirs, should be set aside.
[74] Clarke n3 328.

However, there are two clear barriers to the exhibition of the exclusion characteristic. First, in English law, a community is not a legal entity that can hold legal title to land. Consequently, there must be an underlying legal owner of the land, and it is in that entity that rights of exclusion vest. In some instances, the underlying owner will be an entity artificially constructed by the community for the purposes of holding the legal title, and little compulsion will be needed to ensure that rights of exclusion are enforced for the benefit of the community. However, in some instances, the underlying owner will not be a creation of the community, and may need to be compelled to exclude non-members of the community from the resource.

Second, in many instances, multiple property regimes protecting different species of interest are forced to co-exist over one resource. Therefore, the practical reality of mutual self-interest commons is that a community's use of land will often be concurrent with third-party use. The result of that co-existence is often that the community are unable to exclude non-members from the resource completely, and are instead only able to exclude them from exercising the rights enjoyed by the community. For example, only a community that enjoys rights of common over common land[75] may exercise those rights and exclude others from doing so. However, the same land may be subject to the Countryside and Rights of Way Act 2000, granting the public rights to use the land for the purposes of open-air recreation. As such, where the public are exercising their statutory rights, the commoners are unable to exclude the public from the land. Whilst the community's rights are still protected by the duties of non-interference incumbent upon the public, the shared use of the resource does not tally with the rights of exclusion described in the property scholarship.

There are two solutions to the aforementioned problems. The first is to understand the rights of the community as a 'clone' of those rights enjoyed by the legal owner,[76] which confers upon the community the exclusion rights necessary to protect its interest in the resource. The whole world (X) owes a duty not to interfere with the resource of the

[75] The term 'common land' is here referring to land registered as such pursuant to the Commons Registration Act 1965 or the Commons Act 2006.
[76] Rudden B, 'Economic Theory v Property Law: The Numerus Clausus Problem' in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence, Third Series* (Oxford: Clarendon Press 1987), see also Douglas and McFarlane n39 236.

owner (A).[77] When A grants rights to the community (B) over that resource, A's rights are cloned. X then owes similar rights to B as it did to A in that it cannot interfere with areas of the resource over which B holds rights. Consequently, B enjoys the right to exclude X from the resource, in so far as that exclusion is necessary to prevent interference with the areas of the resource over which B has rights. However, the cloning solution is limited in that it only works for legal rights. In particular, when considering the use of the trust in securing a mutual self-interest common, it is not possible to understand B's rights as a clone of A's, as equitable rights are 'not carved out of a legal estate but impressed upon it'.[78] It is well established that, where A holds property on trust for B, X does not owe a duty to B not to physically interfere with the thing; X owes the duty of non-interference to A only. Therefore, understanding the community's rights as a clone only enables the community to exclude non-members where the rights in question are legal rights.

The second solution is to consider that, whilst members and non-members of the community may engage in concurrent use of the land, it does not necessarily follow that the non-members are also exercising property rights. If the rights of the non-members are not proprietary, they have little more than a liberty to use the resource, with no-right not to be excluded, and the community could exclude them. However, this second solution is also limited, as the use rights of non-members will not always be non-proprietary, and may also be guaranteed by statutes such as the Countryside and Rights of Way Act 2000.

In summary, the second characteristic demands that the community has the right to exclude non-members of the community from the resource entirely; it is not sufficient that a community is able to exclude non-members from exercising the same use rights as the community itself. Therefore, any institution used to secure a mutual self-interest common must confer the requisite exclusory rights. However, to achieve those ends, a community's rights may need to be understood as a clone of the underlying owner's rights. In the alternative, where the rights of non-members over the resource are neither

[77] It should be remembered that the use of the land is only pursuant to a Hohfeldian privilege, which is not protected by imposing a duty upon all others. Instead, the duty is one of non-interference with the land itself, which indirectly protects use.
[78] *DKLR Holding Co (No2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, 474 (Brennan J).

proprietary nor statutory, a community would be able to exclude on the basis that the non-members enjoy nothing more than a liberty to use the resource.

Mutual self-interest

The crux of a mutual self-interest common is that it is intended to deliver a benefit to a defined community, and is governed by the community itself. To that end, a mutual self-interest common is 'just as private to the community as private property is to the private property owner.'[79] As such, the common is not governed with the interests of the public in mind, in the same way as an individual private owner is not obliged to consider the public interest when managing their assets.[80] Therefore, any institution used to give effect to a mutual self-interest common must not import any concern for the wider public interest in the management of the communal resource, and must enable the community to manage the property solely for its own benefit.

Homogeneity of interest

Mutual self-interest commons are less likely to be successful if disparate and conflicting interests of community members have to be accommodated.[81] As such, homogeneity of interest within the community is important, and may dictate whether the common is a success or failure. Ostrom also considers the need for homogeneity in the commons. She asserts that homogeneity requires there to be no strong division of the community by natural boundaries, difference or conflict in use patterns, the perception of risk in the long-term use of the resource, cultural antagonisms and substantially different exposure to risk.[82] Both Clarke and Ostrom focus upon the shared understanding of the community when considering the homogeneity characteristic, and therefore any legal institution used to give effect to a mutual self-interest common must encourage that shared understanding in order to promote homogeneity of interest.

[79] Clarke n3 329.
[80] It is accepted that, in some limited cases, a landowner is required to consider the public interest when managing its land, or is required to seek permission from the state to use its land in a particular way, which will cause the state to consider the public interest.
[81] Clarke n3 329.
[82] Ostrom n46 299.

To that end, it is suggested that a legal institution can promote homogeneity of interest in a mutual self-interest common by protecting only specific interests. In such instances, the rights enjoyed by the community would be limited, lessening the scope for disparate and competing interests. For example, registration of land as a town or village green, considered in chapter seven, only protects the right to engage in lawful sports and pastimes. That right is limited, as it can only be exercised by engaging in a limited class of activities; consequently, the interests of the community are more likely to be homogenous, and less likely to be competing and disparate.

Cohesive community

Clarke suggests that community cohesion has greater significance than the need for homogeneity of interest, as it provides both the means and the motive for promoting the mutual self-interest.[83] Whilst cohesiveness is a feature of the community itself, the legal institution used to give effect to a mutual self-interest common can, and should, promote community cohesion.

Earlier, when defining the community, it was established that community cohesion will likely flow from the geographical proximity of the community members. As such, geographical propinquity to one another, as well as to the resource, was identified as a key element in the definition of community. Therefore, to promote community cohesion, a legal institution used to secure a mutual self-interest common should only confer rights on those who are geographically proximate to the resource. An example of geographical restrictions can again be found in the town and village green regime, examined in chapter seven. Registration of land as a village green only secures rights for the inhabitants of a 'locality or of any neighbourhood within a locality'.[84] It is likely that there will be a degree of cohesion amongst those who are entitled to the village green rights as a result of their geographical proximity, and the legal institution used to secure the common can be credited as helping to achieve that result.

[83] Clarke n3 329-330.
[84] Commons Act 2006, s15.

Idiosyncratic regulation

The hallmark of a mutual self-interest common is that the community governs the resource for its own benefit and in its own interests. Therefore, any legal institution used to give effect to a mutual self-interest common must enable a community to develop binding idiosyncratic regulation regarding the use and management of the resource.

Ostrom cites the Alanya inshore fishery as an example of a successful common governed by idiosyncratic regulation.[85] Following experiments in the allocation of fishing sites, the local co-operative devised rules for the efficient and fair allocation of sites among all licensed fishers in Alanya. These rules included provisions that rotated fishers between fishing grounds, so that each had an equal chance of fishing the most prosperous sites. Ostrom notes that not only did these rules develop from within the group, rather than being imposed from outside, but also that it would have been impossible for an outside agency to achieve such efficient regulation.[86] Devising the rules required knowledge that could only be gained by fishing in the area for an extended period. The task of mapping the local fishing sites, the migration of the fish and the effect that fishing had on the migration could only be done by those with local knowledge and experience of the resource. Furthermore, Bromley suggests that influences and rules originating from outside a community may actually destroy the resource.[87] In a similar example using fisheries, he suggests that governments often seek to modernise fishing practices by subsidising new technologies. The increase in fishing capability upsets institutional arrangements and leads to overfishing; although, many point to the inefficiency of communal rights and not the introduction of alien fishing methods and technology as the reason for the destruction of the resource. In fact, Bromley further suggests that those outside the community will hail the introduction of the technology as a success, branding the institutional arrangements as 'primitive or quaint'.[88] Taken as a whole, Ostrom and Bromley's research supports the assertion that, for a common to be efficiently managed and avoid the tragedy thesis, it

[85] Ostrom n18 17-20.
[86] Ibid 20.
[87] Bromley n23 8.
[88] Ibid.

is the community itself that must develop the regulation of the resource. As such, to satisfactorily facilitate a mutual self-interest common, legal institutions must enable a community to devise idiosyncratic regulation.

Ellickson argues that close-knit groups can govern their land by contract, norms and other less bureaucratic means.[89] It is agreed that, whilst some communities may devise regulation through democratic decision-making processes, it is not necessary for regulation to be devised in that way. Many successful commons come into being as a result of customary use, and are governed by soft rules that develop as a result of community understanding of members' entitlements (that understanding sometimes being centuries-old), rather than hard command and control legal rules.

Furthermore, Blandy's empirical research demonstrates that communities are able to govern through informal processes.[90] For example, Blandy considers communities that govern communal resources successfully without operating a formalised system of majority voting, but which instead operate a system of consensus achieved through regular community meetings (either arranged formally, or arising from ordinary day to day interactions). In those instances, it appears that the softer approach to rule making is valued by the community and, in some instances, is even described as being what 'makes' the community.[91] As such, communities whose rules develop through a co-operative process may in fact have a better chance of long term cohesion amongst community members. That suggestion seems to accord with Ostrom's account of the communities using the Alanya fisheries devising rules through a series of experiments in the use of the fishery.

However, it is suggested that Ellickson is wrong to think that a mutual self-interest common can be governed effectively by a series of private contracts between the community members. The use of such contractual obligations to regulate the common would be complex and unsuitable, for three reasons.

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[89] Ellickson n14 1386. Ellickson uses the phrase 'less bureaucratic means' to contrast with the 'specialized bureaucrats' who he says often make and enforce the rules of an open-access common.
[90] S Blandy, 'Collective Property: Owning and Sharing Residential Space' in N Hopkins (ed) *Modern Studies in Property Law: Volume 7* (Hart Publishing 2013).
[91] Ibid 165.

First, organising the mutually binding web of obligations needed to govern the common, especially if the community was particularly large, could cost a great deal of time and money.[92] It was established earlier that, where governance costs outweigh the costs of exclusion, private property regimes tend to prevail. Therefore, attempting to use contractual obligations to regulate the common may in fact lead to inefficiency, and the privatisation of communal resources. Second, as a community is not a legal entity, each member of the community would need to contract individually with all other members to create mutually enforceable and binding regulations.[93] The regulatory scheme would fail if some individuals held out and did not participate, or if the contractual obligations did not mirror one another. Third, the remedy for the breach of contractual regulation would lie in the law of contract only. As is argued below, breach of contract actions will not lead to the sanctions necessary for breaches of regulation governing a mutual self-interest common.

In summary, it is central to a mutual self-interest common that the community is able to govern the resource itself, and for its own benefit. The regulation should be devised by the community either through a formal decision-making process, or by less formal means, such as custom. However, a series of private contracts between community members is not a suitable way to achieve the regulation of the common. Any legal institution used to secure a mutual self-interest common must bind the community members to the regulation without relying on private contracts.

[92] It is conceded that the community will be limited in size as a result of the cohesion requirement, but it is still possible that the group would be large enough to cause administrative difficulties. Blandy n90 165 also highlights the difficulty of governing by consensus, with some community members expressing frustration at the time-consuming nature of seeking consensus for the establishment and modification of community rules.

[93] If the community had the status of a legal entity, each community member could contract with the community itself. Following the notion of community right-holding, the right to enforce the obligation would be held by the community for the benefit of the collective, but could be enforced by any individual member of the community. Blandy also observes that property covenants cannot be used to secure performance of community obligations given the unenforceability of positive covenants against successors in title to the original covenantor (Blandy n90 164). Therefore, to ensure that all members of the community and their successors are governed by mutually enforceable obligations, all would need to agree to the contractual rules.

Sanctions

For idiosyncratic regulation to be effective, there must be sanctions for the breach of that regulation. Therefore, the eighth characteristic of a mutual self-interest common that must be facilitated by a legal institution is the availability of sanctions.

Clarke identifies two limbs to the sanctions requirement: mutual enforcement, and the ultimate sanction of exclusion.[94] Ostrom argues that, under the mutual enforcement limb, members of the community must regard themselves as entitled and required to police the behaviour of others. [95] Returning to the Alanya fishery example, the fisherman monitor the use of the agreed fishing locations, and the enforcement of the rules allocating their use. Cheating the rotation system and using a more prosperous site that one is not entitled to on a particular day would be detected by those who are entitled to use those sites, and the fisher who is burdened by the cheat will take measures to protect his entitlement. The other fishers, in seeking to disincentivise cheating so that their entitlement to fish on the prosperous sites is not interfered with, will support him in the hope that there would be a reciprocity of support should they have need for it.[96]

The second limb of the characteristic is that the ultimate sanction should be exclusion from either the use of the resource, or the community that uses the resource. Exclusion from the community will be, in most cases, tantamount to exclusion from the resource itself. If the excluded member of the community only enjoyed use rights over the resource as a result of his community membership, he will lose those use rights upon ceasing to be a member of the community. However, if the public enjoys use rights over the same resource as the community, the excluded member of the community will still be entitled to use the resource, in so far as the public use rights allow.

As outlined above, Blandy extols the virtues of community rule making through informal processes. However, a note of caution should be urged. Communities that do not govern through hard command and control rules, and which instead prefer the softer

[94] Clarke n3 330-331.
[95] Ostrom n46 304.
[96] Ostrom n18 20.

forms of regulation envisaged by Blandy, must still provide for sanctions to enforce that regulation. To that end, it is likely that communities governing through soft rules will exhibit the mutual enforcement characteristic, the essence of that characteristic being community co-operation and community-led monitoring. Conversely, it is less likely that the second limb will be exhibited naturally. There must be some legal force behind the exclusion in order for it to have full effect in compelling community members to either act or refrain from acting in a particular way. However, having legal force behind the exclusion suggests the presence of hard command and control rules, not just simply soft rules. At best, the enforcement of soft rules would be by community-led sanctions, such as social isolation. The effectiveness of those sanctions in guiding the behaviour and actions of community members relies on a community member who might otherwise break the rules being sufficiently swayed by the social pressure of his peers, the desire to maintain good relations, and the fear of his standing in the community being diminished.

Contractual sanctions

It was asserted earlier that private contracts between community members cannot be used to secure the idiosyncratic regulation of a mutual self-interest common. One reason for that assertion is that the sanctions available for breach of contract do not meet the sanctions requirement of a mutual self-interest common.

With regard to the mutual enforcement limb, members of the community would monitor compliance with the contractual obligations and enforce them against those in breach. Community members may turn to the courts when enforcing the obligation, but it is the community members, and not an outside enforcement agency, that must identify breaches and commence proceedings. Helpfully, Ostrom's account of the mutual enforcement characteristic expressly provides for an enforcement authority within the community, and it could be argued that the courts perform that role. Accepting the jurisdiction of the courts over the private contracts brings the courts' enforcement authority within the community sphere, and the community are reinforcing that authority and identifying the breaches as Ostrom envisaged.

However, with regard to the exclusion limb, private contracts cannot meet the sanctions characteristic. The primary remedy for breach of contract is damages and, in special circumstances, the equitable remedies of an injunction or specific performance. Exclusion from either the resource or the community as a sanction for breach of contract requires the contract to stipulate as much, yet clauses that stipulate remedies for a breach are typically confined to agreed damages clauses.[97] An agreed damages clause will not be enforceable if

> …the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.[98]

Therefore, as the intentions behind the exclusion sanction are punitive, and is not an alternative to the performance of the contractual obligation, exclusion cannot be secured through an agreed damages clause.

As such, exclusion, as a sanction for breach of contract, has three hurdles to clear, the combination of which, it is submitted, is insurmountable. First, the sanction of exclusion is not available as of right, or even at the discretion of the court, unless provided for in the contract. Second, pre-determined consequences and remedies for breaches are confined to damages clauses which, ordinarily, provide for the payment of a specified sum of money only. In any event, exclusion from the resource would most likely be deemed disproportionate to the legitimate interests of the parties not in breach, and would be unenforceable as a result. Third, the community does not enjoy legal standing to exclude a member from the resource anyway, as it will not hold the legal title to the land, and even an excluded member may continue to enjoy any public use rights that exist over the resource.

[97] Also referred to as 'liquidated damages clauses'.
[98] *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 [32] (Lord Neuberger and Lord Sumption).

V. PROJECT STRUCTURE AND HYPOTHESIS

The aim of this project is to assess whether English law facilitates mutual self-interest commons, with the intention of that property regime securing community amenity space. To that end, the legal institutions that can be used to secure a mutual self-interest common will be assessed against the eight identified characteristics to determine the extent to which they facilitate those commons.

The legal institutions considered by this project can broadly be divided into two species: those that Clarke labels as 'ownership vehicles', and those that this project shall refer to as 'regulatory schemes'. Ownership vehicles are legal mechanisms that are used to circumvent the rule that only legal entities may own land, and the fact that communities are not legal entities. The consequence of that rule and fact is that a community may only have enforceable rights over land held by someone else. However, if the land is held by a legal entity created by the community solely for the purpose of holding title its behalf, the arrangement could produce an outcome that is tantamount to community ownership. Even if the property is not held by an entity created by the community, the land may be held by that entity for the benefit of the community, and could still be considered tantamount to community ownership. The four ownership vehicles that will be considered for the purposes of securing a mutual self-interest common are the trust, unincorporated association, companies, and co-operative and community benefit societies.

In contrast, regulatory schemes do not challenge the settled understanding that communities are unable to own land. Instead, regulatory schemes subject land owned by either a private entity or the state to a particular regulatory framework that is guided by the community interest. A regulatory scheme does not seek to achieve community ownership of land through the 'back door', and instead embraces the notion that a community only enjoys rights over a resource held by someone else. The three regulatory schemes that will be considered in this project are the scheme of commons registration, town and village green registration and planning law (particularly land designation).

Hypothesis

By assessing the seven legal institutions that may be used to secure a mutual self-interest common against the eight required characteristics, it will be demonstrated that there is no legal institution available in English law that satisfactorily facilitates such commons. As such, the real tragedy of the commons in English law is that, despite communal property, and mutual self-interest commons specifically, being desirable in some cases, there is no legal institution that can be used to support such an arrangement.

VI. CONCLUSION

This project assesses the extent to which English legal institutions facilitate mutual self-interest commons with amenity and recreational value. This study is important because, contrary to the tragedy of the commons thesis, commons are not always doomed to fail, inefficient or undesirable. In fact, the converse is true; in some cases, communal property is desirable, and the most efficient way of managing of a resource, especially where the cost of excluding others from a resource outweighs the cost of governance. In addition, in a legal landscape where the prevalence of private amenity space is in decline, it is imperative that communal spaces with amenity and recreational value are protected.

Therefore, English law should facilitate the commons, and it is important to understand the extent to which it currently does. In particular, this project is concerned with the facilitation of mutual self-interest commons, which are a type of limited-access common, as it is the type of common most likely to withstand the tragedy of the commons thesis.

To determine whether English legal institutions facilitate mutual self-interest commons, it is necessary to assess those institutions against the eight required characteristics of a mutual self-interest common. A legal institution will only facilitate a mutual self-interest common if it promotes, or at least facilitates, the eight required characteristics. Overall, this project will show that no English legal institution satisfactorily facilitates mutual self-interest commons. As such, the real tragedy of the

commons is that, notwithstanding the desirability of mutual self-interest commons in some circumstances, English law does not satisfactorily facilitate that property regime.

Chapter 2 | TRUSTS

The first legal institution examined by this project is the trust. The trust is an ownership vehicle which, in effect, enables a community to hold title to land. However, not all members of the community are able to hold the legal title to the land as trustees, with most only holding an equitable interest as beneficiaries of the trust.[1]

Clarke briefly examined the trust as an ownership vehicle for mutual self-interest commons.[2] She concluded that, whilst the trust can be adapted to work as a communal holding device, it is not designed for such a purpose.[3] This chapter goes further than Clarke's criticism, and will first rule out using public trusts to secure a mutual self-interest common, before also demonstrating that the private trust does not exhibit the eight required characteristics. The dominant reason, amongst other technical reasons, for the private trust's failure to exhibit the eight characteristics can be attributed to the treatment of trust property as wealth, rather than appreciating its intrinsic value as a thing.[4] The trust has long been used as a wealth management device, and for it to be used as a means of securing a common-property regime in which the asset is valued according to its use value, and not financial value, a reconsideration of the trust concept is required.

I. PUBLIC VS. PRIVATE TRUSTS

Broadly, two species of trust exist: public and private. The private trust, subject to a few limited exceptions, must be created for the benefit of identifiable human beneficiaries.[5] Conversely, public trusts are either created for the benefit of the general public, giving rise to so-called 'public property', or charitable trusts, which further a purpose demonstrated as being for the benefit of the public.

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[1] In trusts of land a maximum of four trustees may hold the legal title: Law of Property Act 1925, s34(1).
[2] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 350.
[3] Ibid 355-356.
[4] See B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81 on the distinction.
[5] *Morice v Bishop of Durham* (1805) 10 Ves 522.

Charities

Charitable trusts are purpose trusts that are for the benefit of the public. If the purpose of a trust falls under one of the thirteen purposes contained in section 3 of the Charities Act 2011, meets the public benefit requirement in section 2(1)(b) and section 4 of the Act, and is exclusively charitable,[6] a valid charitable trust can be created.

The public benefit requirement prevents the charitable trust being used to secure a mutual self-interest common. There is no statutory definition of public benefit; the definition is instead derived from an extensive body of case law and non-statutory guidance published by the Charity Commission. Broadly, the requirement has two limbs.[7] First, the nature of the purpose must be able to benefit the public. Second, those who may benefit from the purpose must be sufficiently numerous.

The first limb of the requirement is incompatible with a mutual self-interest common. To meet the first limb of the public benefit requirement, the purpose must confer either a direct or indirect benefit on the public, although a wider benefit may suffice.[8] Therefore, if the charitable purpose conferred an indirect or wider benefit on the public generally, whilst also directly benefitting the mutual self-interest community, the first limb of the public benefit requirement could be met. However, a mutual self-interest common should confer a benefit only on a discrete community, making indirect or wider benefits to the public incompatible with such commons.

In any event, it seems unlikely that a charitable trust securing a mutual self-interest common can in fact benefit the public. For example, if the purpose of the trust was to provide recreation facilities[9] for a defined community, that purpose would not confer either a direct, indirect or wider benefit on the public. There would be no direct benefit, as the defined class of beneficiaries excludes the public. There would also be no indirect benefit, as any indirect benefits must relate to the stated charitable purpose. For example, in *Independent Schools Council v The Charity Commission for England*

[6] Charities Act 2011, s1(1)(a).
[7] *Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 [44] (Warren J).
[8] Ibid [37].
[9] The argument advanced is valid irrespective of the stated purpose.

and Wales, Warren J rejected the argument that allowing members of the public to use a private school's recreational facilities outside of school hours furthered the advancement of education (the purpose for which the trust was created) for the public generally.[10] Therefore, in the given example, any indirect benefit would probably require that the public are able to use the recreation facilities alongside the mutual self-interest community, which is incompatible with the definition of a mutual self-interest common.

The second limb of the public benefit requirement is also incompatible with a mutual self-interest common. The second limb dictates that the class of beneficiaries cannot be defined by virtue of a familial or employment relationship, or by membership of an unincorporated association,[11] and that the trust must be capable of benefitting either the public generally or a sufficient section of the public.[12] Two points of note arise from this requirement. First, a purpose that benefits the public generally is incompatible with a mutual self-interest common, which benefits only a discrete community. Second, it is likely that the discrete community benefitting from the common will not have a sufficient 'publicness' to meet the public benefit requirement. Whilst it is acceptable to limit benefits to those from specific geographical areas, if the benefit is further limited to a select few in that area, the benefit is not to a sufficient section of the public.[13] Therefore, even though a mutual self-interest community is defined in part according to geographical boundaries, as it is also numerically small, it is unlikely to fulfil second limb of the public benefit requirement.

Overall, the public benefit requirement prevents the charitable trust being used to secure a mutual self-interest common. A mutual self-interest common does not confer benefits on the public, nor should it be managed according to the public interest. Therefore, the charitable trust is discounted as a method of securing a mutual self-interest common, and will not be considered further in this chapter.

[10] *Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 [203].
[11] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.
[12] Charities Act 2011, s2(1)(b).
[13] *IRC v Baddeley* [1955] AC 572, 592 (Lord Simonds).

Public property

Public property can emerge in many ways. Rose suggests that public rights may arise through prescription or dedication, by which a period of use by the public gives rise to an implied grant or gift of the property from the landowner.[14] Alternatively, she suggests that custom may allow the public to assert ownership rights over resources where the use dates back to time immemorial.[15] However, the public trust doctrine is the standout and leading argument for public property.

The public trust doctrine has its origins in Roman law, which had four categories of property that could not be privately owned: *res communes*, *res publicae*, *res universitatis*, and *res nullius*. Rose suggests that the Roman law distinction between public and private things indicates a long-standing notion of public property in the Western legal tradition that has influenced much of European law.[16] Traditionally, the public trust doctrine has been applied to the sea, seashore and perennial rivers.[17] However, over the last fifty years, the doctrine has been generalised, particularly by the scholarship of Sax, who argues that the public trust doctrine should be a vehicle for ensuring that public bodies pay attention to, and vindicate, the public interest in resources.[18] Therefore, the doctrine may apply to any resource in which the public have an interest through both their use, and the expectations that they form regarding that use. To that end, Rose argues that property that is inherently public is any property that 'the public needs for travel, communication, commerce, and to some degree public speaking'.[19] In other words, Rose believes that any property, the use of which connects 'one another and with a wider world and allow all to interact in a social whole',[20] should be subject to the public trust doctrine; this definition spans far beyond the environmental and natural resources to which the doctrine is traditionally applied.

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[14] CM Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Westview Press Inc 1994) 106.
[15] Ibid.
[16] Ibid.
[17] JL Sax, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' (1970) 68 *Michigan Law Review* 471, 475.
[18] Ibid; see also CM Rose, 'Joseph Sax and the Idea of the Public Trust' (1999) 25 *Ecology Law Quarterly* 351, 355.
[19] Rose n18 359 and Rose n14 106.
[20] Rose n18 359-360 and Rose n14 106.

Rose's wide conception of inherently public property has not found favour with other commons' scholars, and Sax's position remains the favoured one. Therefore, the modern public trust doctrine can be described as 'preventing the destabilizing disappointment of expectations held in common but without formal recognition of such as title',[21] and 'protect[ing] such public expectations against destabilizing changes, just as we protect conventional private property from such changes.[22]

The modern public trust doctrine is rarely referenced in English law, and is a largely American concept. Instead, English law contains mechanisms that invoke considerations equivalent to those found in the public trust doctrine, but which are not labelled as such. One example can be found in the Open Spaces Act 1906, which provides that a local authority that has acquired an estate or interest in a burial ground or open space under the powers of the Act shall

> hold and administer the open space or burial ground *in trust* to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of this Act and under proper control and regulation and for no other purpose.[23] (emphasis added)

As a method of securing and vindicating public rights over resources, the public trust doctrine is problematic. In particular, many resources cross the public and private divide dependent on context and circumstance. A private owner or public body may hold title to a resource that at times is subject to public rights, and at other times is theirs absolutely.

A bigger conceptual problem has also emerged. Describing relationships with natural resources as a 'trust' raises the question of whether the public has a proprietary interest in the relevant resource. If it does, the consequence is that the legislature would be constrained, as the takings doctrine would protect public property in the same way it protects private property. Proprietary rights in favour of the public may prevent allocations of resources, or hinder the management of resources to the detriment of the

[21] JL Sax, 'Liberating the Public Trust from Its Historical Shackles' (1981) 14 *University of California Davis Law Review* 185, 188.
[22] Ibid.
[23] Open Spaces Act 1906, s10(a).

public at large.[24] As Rose notes, 'the unorganized public could trump its own legislature's acts'.[25] The confusion and consequences of classifying public rights as proprietary is one reason why Sax was keen to emphasise that that the public trust does not confer proprietary rights on the general public.[26] For Sax, the public trust doctrine is not a 'trust' in the sense that a private lawyer would understand it. Instead, the public trust doctrine only influences the calculation of weight and balance between the interests of individuals and the public.

In any event, for the purposes of the present project, the public trust doctrine is, for the same reasons as the charitable trust, unsuitable as a method of securing a mutual self-interest common. Mutual self-interest commons protect only a discrete community's use of land, and are not concerned with securing use rights and benefits for the public at large. As such, given that the public trust doctrine and its English law equivalents confer rights on the general public, they cannot be used to secure a mutual self-interest common.

Private trust

In a private trust, the resource is held and managed only for the benefit of a defined class of beneficiaries, rather than the public at large. As such, the private trust may be used as an ownership vehicle securing a mutual self-interest common, with the community forming the class of beneficiaries.

Nonetheless, private trusts suffer a disadvantage when compared to public trusts. Private trusts must be intentionally settled,[27] and do not arise simply as a result of the nature of the property or its use. In practice, this means that the settlor of a private trust used as an ownership vehicle for a mutual self-interest common must be sympathetic towards the community and their desire to secure the common-property regime, and settle their property on trust to achieve those ends. In reality, it is likely that the settlor will originate from the community that uses the resource, or at least derive some benefit

[24] R Epstein, 'The Public Trust Doctrine' (1987) 7(2) *Cato Journal* 411, 418-421.
[25] Rose n18 357.
[26] Sax n17 478-484.
[27] Constructive and resulting trusts are limited exceptions to this rule, and are not examined in this chapter. The trust must also be evidenced in writing where the trust property is land: Law of Property Act 1925, s53(1)(b).

from the community's engagement with the land. Unless there is a radical overhaul of English law, it is unlikely that a landowner would be compelled against their will to settle land on trust for the benefit of a community.[28]

Private trusts: wealth management

The traditional role of the private trust is as a wealth management device, not a device for facilitating the use of the trust property by the beneficiaries. To that end, the trust is typically used to manage things that are valued as wealth, rather than things that are valued as things. Rudden explains that where a thing is valued as wealth it is 'treated in terms, not of its own inherent qualities, but of its opportunity cost'.[29] As such, the item is not treated as unique; it can be exchanged or converted, and it is the asset's financial value that is of concern. Conversely, things valued as things are treated for their own intrinsic qualities, regardless of financial value, and are considered unique.[30]

A mutual self-interest common should be valued as a thing, not as wealth; the community's relationship is with a particular resource, and its use of it. To that end, there has been some reform to the law of private trusts leaning towards valuing the trust property as a 'thing', especially where the trust property is land. For example, under the 1925 property legislation, co-ownership of land took effect as a trust for sale.[31] Therefore, communal property would be held by trustees, subject to the primary duty to sell the trust property, although it was possible to postpone sale.[32] Reform came through the Trusts of Land and Appointment of Trustees Act 1996, which replaced the trust for sale with a 'trust of land',[33] and does not impose the core duty of sale on the trustees.[34] It is still possible for trust property to be sold, either by the agreement of the beneficiaries or pursuant to an order made under section 14 of the 1996 Act, but sale is not the primary aim of the trust. Furthermore, section 3 of the 1996 Act provides that

[28] Such compulsion would probably contravene both Article 8 and Article 1 of the First Protocol to the European Convention of Human rights.
[29] Rudden n4 86.
[30] Ibid 83.
[31] Law of Property Act 1925, s36(1).
[32] Law of Property Act 1925, s25.
[33] Trusts of Land and Appointment of Trustees Act 1996, s1(2).
[34] It is still possible to expressly create a trust of land with the duty to sell, however the effect of the Trusts of Land and Appointment of Trustees Act 1996, s4(1) is to imply the power to postpone sale in these circumstances.

beneficiaries' interests are in the trust property itself, rather than the capital value of the property,[35] and section 12 affords beneficiaries with an interest in possession the right to occupy the land.[36]

Nonetheless, modern trusts still primarily function as wealth management devices, and the effect of the 1996 reforms in transforming the trust from a wealth management to a 'thing' based appraisal of the trust property is undermined. In particular, if sales of the trust property do occur, sections 2 and 27 of the Law of Property Act 1925 ('LPA 1925') continue to allow the overreaching of beneficial interests in trusts of land; the property may be sold unencumbered by the beneficiaries' interests, which are transferred into the capital monies paid. The intrinsic value of the property is disregarded in favour of a wealth-based approach. Furthermore, overriding interests[37] that do acknowledge the intrinsic value of land, such as those interests of trust beneficiaries in actual occupation, are overreachable.[38]

As such, even with the 1996 reforms, English law still views the trust as a wealth management device. Rudden argues that any interest that can be overreached treats the object of that interest not as a thing, but as wealth.[39] Therefore, all the time overreaching is a feature of English law, trust property will be viewed as wealth, rather than for its own intrinsic value. In order for the private trust to have any degree of success in securing a mutual self-interest common, the doctrine of overreaching, and the wealth based approach of the trust generally, will most likely need to be reviewed.

Community right-holding

In a common-property regime it is expected that the community itself holds the communal rights to the resource. However, the private trust is an example of the 'class action concept of collective rights' put forward by McDonald, and noted in the introduction to this project.[40] The concept provides that, if a collection of individuals

[35] Section 3 codifies the decision in *Williams and Glyn's Bank v Boland* [1981] AC 487.
[36] The right to occupy can be excluded or restricted under section 13.
[37] Land Registration Act 2002, schedules 1 and 3.
[38] *City of London Building Society v Flegg* [1988] AC 54.
[39] Rudden n4 89.
[40] 'Introduction' pp20-21.

hold substantially similar property rights that are exercised in common, the community itself does not hold the right. Instead, the community is just a group of similarly situated individuals, and a 'convenient device for advancing the multiple discrete and severable interests of similarly interested individuals'.[41] However, it is only possible to make use of the institutions available, and in the absence of an institution specifically designed for communal property holding, using private law institutions to achieve the same ends will always be case of square pegs and round holes.

Private trusts: scope of inquiry

This chapter considers trusts that are for the benefit of identifiable human beneficiaries. Private purpose trusts will not be considered as they are not generally permitted, with only some limited exceptions.[42] Instances in which a community meets the definition of an unincorporated association are considered in chapter three.

Furthermore, only fixed trusts are considered in this chapter. Discretionary trusts are excluded as the beneficiaries of such trusts are not entitled to benefit from the trust property, and are instead only entitled to be considered by the trustees for the receipt of a benefit from the trust. As the premise of a mutual self-interest common is that a community is entitled to a resource above all others, a discretionary trust is not appropriate to achieve those ends.

The use of the private trust

As a method of securing a mutual self-interest common, the private trust lends itself to instances in which title to the resource is already held by a member of the community, rather than instances in which title must first be acquired by either a community member or the community itself (through an ownership vehicle) before a trust is declared. Where title to the land is held by a third party, it would make better sense to utilise one of the corporate forms examined in chapters four and five.

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[41] M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218.

[42] *Morice v Bishop of Durham* (1805) 10 Ves 522. The exceptions to the rule are trusts for the maintenance of specific animals, erection of monuments and tombstones, trusts for the performance of private masses and foxhunting.

For example, the trust could be utilised in instances in which the residents of a road make use of a green space, the title to which is held by another resident of the road and therefore a member of the community. That community member, being sympathetic and supportive (and possibly even encouraging) of the community's use, may voluntarily declare a trust over their land for the benefit of the community in order to secure that use in the long-term. If, on the other hand, the land was owned by a third party from outside the community, the likelihood of that landowner being sympathetic to the community's use, and the chances of them voluntarily declaring a trust, are lower. Therefore, it may be necessary either for a community member to first acquire the land before declaring a trust, or for the community to acquire the land through another ownership vehicle, such as those considered in chapters four and five, in which case the trust is superfluous.

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

Subject to any contrary provision in the trust instrument, a trustee of a trust of land has all the powers of an absolute owner,[43] including the power to alienate the property. Clarke argues that trustees' alienation powers ensure that beneficiaries have no right to insist on their use of the trust property, as it may be exchanged, leaving beneficiaries entitled only to a share of the trust income and capital.[44] That argument accords with the use of the trust as a wealth management device, as opposed to valuing the property as a thing.

However, the inalienability characteristic is not concerned with alienations of the resource per se, but rather alienations that defeat communal rights. To that end, it is possible to alienate trust property and the transferee hold it on trust for the community,

[43] See in particular the Trusts of Land and Appointment of Trustees Act 1996, s6(1) where the trust property is land.
[44] Clarke n2 355.

avoiding the defeat of the communal beneficial rights. Nonetheless, the trust still does not exhibit the first limb of the inalienability characteristic, for two reasons.

First, instances in which the resource would be transferred subject to the community members' beneficial interests are rare, as it is likely that those interests will be overreached.[45] As such, whilst the community's interest will continue to exist, it will exist only in the capital sum raised by the transfer; the resource, and the community's entitlement to it, will be lost. The danger posed by overreaching is magnified when it is considered that the principle operates even if the alienation is in breach of trust (although not if it is ultra vires).[46] Therefore, as a mutual self-interest common should secure a community's entitlement to a specific resource, thereby valuing the asset as a 'thing', and not according to its financial value, overreaching presents a serious challenge to the inalienability characteristic.

Second, in some instances trustees are obliged to alienate the trust property, defeating the rights of the beneficiaries to that particular asset. For example, trustees are duty-bound to manage the trust property in the best interests of the beneficiaries, and are aided in this duty by a general power to invest the trust property.[47] Therefore, if the interests of the beneficiaries are best served by the investment of the trust capital, trustees are obliged to make those investments and alienate and exchange the resource.[48]

However, there are three possible mechanisms through which alienations defeating communal beneficial rights can be prevented. First, an appropriately drafted trust instrument may limit or exclude trustees' alienation and investment powers, preventing the alienation of the trust property.[49] Second, in *Cowan v Scargill*, Sir Robert Megarry VC remarked that whilst the best interests of beneficiaries are usually understood as their best financial interests, financial returns are not always the yardstick by which

[45] Law of Property Act 1925, s2 and s27.
[46] G Ferris and G Battersby, 'The General Principles of Overreaching and the Modern Legislative Reforms, 1996-2002' (2003) 119 *Law Quarterly Review* 94.
[47] Trustee Act 2000, s3.
[48] *Cowan v Scargill* [1985] Ch 270, 286-287 (Sir Robert Megarry VC).
[49] Power of disposition can be limited or excluded pursuant to the Trusts of Land and Appointment of Trustees Act 1996, s8(1).

investments should be measured.[50] If the best interests of the beneficiaries should not always be understood as their best financial interests, trustees may be able to decline to alienate and invest the trust property. However, it is unlikely that Megarry VC's dicta alone would validate a trustee's decision not to liquidate and invest the trust property. In context, his Lordship's statement clearly envisaged some form of financial return still being made, and also required all beneficiaries to be of age and sound mind, and able to consent to the investment decision.[51] Therefore, it seems at least some investment must still be made, especially as there will inevitably be some members of the community unable to consent to no investment being made.

Third, pursuant to section 40 of the LPA 1925, restrictions may be recorded against the legal title to the land. Restrictions may prohibit the making of an entry on the register in respect of dispositions of the legal title to land, whether for a period of time, or until the occurrence of a specific event.[52] The statute suggests, without prejudice to the general wording of section 40, that the 'specific' event could be the obtaining of consent.[53] Therefore, alienations of the communal resource may be prevented through the use of a restriction, or at least make alienation conditional upon the consent of the beneficiaries.

Restrictions are not a complete answer to the alienability problem, as they may be withdrawn pursuant to section 47 of the Land Registration Act 2002 ('LRA 2002') and rule 98 of the Land Registration Rules 2003 ('LRR 2003'), or cancelled pursuant to rule 97 of the LRR 2003. However, those provisions carry a limited risk. Applications made under rule 98 require the consent of those who have an interest in the restriction, or those who are named in the restriction as needing to provide consent and, as it is unlikely that the community members would consent, the danger of the restriction being removed is minimal. Similarly, the risk of a restriction being cancelled pursuant to rule 97 is minimal, as cancellations only occur where the restriction is 'no longer required'. If the restriction is protecting the land from an alienation that would defeat

[50] [1985] Ch 270, 287-288.
[51] Ibid 288.
[52] Land Registration Act 2002, s40(2)(b).
[53] Land Registration Act 2002, s40(3)(b).

the communal rights over it, and the common-property regime continues to exist, the restriction is still required, and does not fall within the scope of rule 97.

Finally, pursuant to sections 41(2) and 41(3) of the LRA 2002, restrictions may be modified or discharged on the application of anyone who has a sufficient interest in the restriction. It has been suggested that these provisions may bite even if the restriction requires the consent of a specific party to a disposition, but that person cannot be found, and the registrar is satisfied that the disposition should be made.[54] Therefore, the registrar may opt to allow alienations of the land that would defeat the community's rights to it. However, the risk of the registrar making such a decision is also limited; if the restriction is overtly aimed at protecting communal rights over the resource, it is unlikely that it would be modified or discharged to defeat that objective.

In summary, the private trust does not fully exhibit the first limb of the inalienability characteristic. The trust is primarily a wealth management device, focused on the financial value of the assets, as opposed to their intrinsic value as things. As such, the presumption is that the communal asset held on trust is freely alienable, with its alienation facilitated by the overreaching doctrine. Limitations and exclusions in the trust instrument may seek to prevent such alienations, although the effect of these are limited to the quality of the drafting of the instrument, and overreaching may still operate even if transfers are made in breach of those limitations and exclusions. Instead, restrictions on the register may prevent alienations that defeat communal rights over the specific land; however, as there is (albeit limited) scope for these to be withdrawn, cancelled, modified or discharged, they alone cannot be relied upon to secure the mutual self-interest common.

Severance and alienation of a discrete share

The second limb of the inalienability characteristic requires that community members do not hold a discrete share in the mutual self-interest common that they may alienate outside of the community. To that end, at first glance, the private trust adheres to the

[54] C Harpum et al, *Megarry and Wade the Law of Real Property* (Sweet and Maxwell 8ed 2012) 7-077. The argument does not appear in the 2019 ninth edition of the text.

second limb of the inalienability characteristic; the presumption is that the community members will hold the equitable interest as joint tenants, not as tenants in common.[55] However, when probed, two weaknesses emerge.

First, whilst a joint tenancy of the beneficial interest prevents the alienation of a discrete share, it also ensures that the right of survivorship applies. Therefore, whenever a community member dies or ceases to be a member of the community, there is no disposal of their interest, which remains with the other joint tenant community members. As such, the community is ever-diminishing, and the last remaining member takes an absolute entitlement to the resource, which is inconsistent with a common-property regime, and specifically the perpetuity and intergenerational equality characteristic.

Second, the trust instrument may override the presumption and state that the community members are tenants in common as opposed to joint tenants, or severance of the joint tenancy into a tenancy in common may occur at a later date through either common law[56] or statutory methods.[57] If division into tenancy in common shares does occur, each community member would hold a discrete share of the resource, and any benefit it produces.

Nonetheless, even if community members do hold discrete tenancy in common shares, the transfer of those shares outside the community may be prevented. Those ends could be achieved by the trust instrument either preventing assignments of the beneficial interest, or providing for rights of pre-emption in favour of the community. Both options have their own problems.

First, using the trust instrument to prohibit beneficiaries assigning their equitable interest may not in fact prevent alienations. Whilst a community member could be prevented from outrightly assigning their interest, it is arguable that they may still declare a trust over their equitable share in favour of non-members of the community.

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[55] The presumption is an application of the maxim 'equity follows the law', see *Goodman v Gallant* [1986] 2 WLR 236 and *Stack v Dowden* [2007] UKHL 17.
[56] *Williams v Hensman* (1861) 70 ER 862.
[57] Law of Property Act 1925, s36(2).

A declaration of a sub-trust would allow the equitable interest in the trust property to be enjoyed by another, and may, in some cases, be tantamount to an assignment of the beneficiary's entire interest.[58] Lord Upjohn's view is that the declaration of a sub-trust has the legal effect that 'the trustees become trustees of the equitable interest for the donee and the donor disappears from the picture'.[59] As such, his Lordship's view is that the declaration of trust effectively operates to transfer the equitable title, and is tantamount to an assignment.[60] Therefore, a community member may still 'assign' their equitable interest even in the face of a prohibition in the trust instrument.

However, the effectiveness of these 'back door' assignments is subject to doubt following the Court of Appeal's decision in *Barbados Trust Company Ltd (formerly known as CI Trustees (Asia Pacific Ltd) v Bank of Zambia and Another*,[61] which concerned the assignment of contractual rights. It was held that, contrary to the general rule, where the trust property was the benefit of contractual rights, the beneficiary of a trust would be prevented from bringing proceedings directly against the other contracting party, where the declaration of trust was intended to have the same effect as an assignment, and yet assignment was prohibited in the contract. Following that reasoning, if a community member did declare a sub-trust of their equitable interest in favour of a non-member of the community, the non-member would not be able to enforce the trustee's obligations in the primary trust that secured the mutual self-interest common. The sub-beneficiary would only have rights against the community member declaring the sub-trust, who would need to enforce against the trustees of the primary trust.

Arguably, following *Barbados Trust Company Ltd*, the declaration of a sub-trust should not be seen as an assignment. There are two reasons for this argument. First, as it is the beneficiary of the primary trust who may enforce against the trustees of the primary trust, they must have standing to do so, and must not have divested themselves

[58] The debate on this issue takes place in the context of the requirement that assignments of equitable interests should be made in writing pursuant to the Law of Property Act 1925, s53(1)(c). If a declaration of trust is held to be just that and nothing more, the requirement for writing under s 53(1)(c) need not be met. However, if the declaration of trust is viewed as an assignment of the entire equitable interest, s53(1)(c) must be complied with.
[59] *Grey and Another v Inland Revenue Commissioners* [1958] Ch 375, 382.
[60] Ibid.
[61] [2017] EWCA Civ 148.

of their equitable interest through an assignment. Second, if the declaration of a sub-trust is taken to mean that the community member does in fact become a sub-trustee, s53(1)(c) of the LPA 1925 need not be complied with, yet the transaction must comply with that formality to be an assignment. However, the decision in *Barbados Trust Company Ltd* is yet to be tested in the context of a sub-trust, and it remains to be seen whether it would be applied.

In addition, utilising rights of pre-emption in favour of the community is also problematic. As the community does not have legal personality, the equitable shares cannot be transferred to the 'community'. Instead, the transferee would have to be a member of the community, who would then themselves hold a discrete equitable share. The act of one joint tenant purchasing the tenancy in common share does not operate to return the share to the joint tenancy, and the problem of there being discrete shares and entitlements to discrete benefits from the resource does not go away. The only way to revive the equitable joint tenancy once it has been severed is to re-settle the trust, which could become expensive and impractical over time.

Furthermore, rights of pre-emption are only rights of first refusal, and do not guarantee that the severed equitable share will in fact be transferred to others within the community. If the transferor demanded a price for the severed shares that other community members were either unable to unwilling to pay, or if community members decided for some other reason not to receive the shares, they could be transferred to someone from outside of the community.

Overall, once a community member has severed their equitable share, it is difficult to ensure that share is not transferred, especially outside of the community. That freedom to alienate and transfer shares again highlights the trust's function as a wealth management device furthering fungible interests. In order to exhibit the second limb of the alienability characteristic, it is necessary to prevent severances of shares in the first place, rather than only seeking to limit alienations once severance has occurred.

The beneficiary principle: vested interests

The beneficiary principle requires that there must be human beneficiaries in whom the beneficial interest can vest.[62] As such, the community members, as the beneficiaries of the trust, enjoy a vested interest in the trust property, which they are able to sever into discrete shares.

However, Kohler correctly identifies that, in communal ownership, an individual's right to the communal resource arises as a result of their status as a member of the community, and no individual has a right vested in them that they can deal with outside of the community.[63] Therefore, it is the vested interests of beneficiaries that precludes the exhibition of the second limb of the inalienability characteristic. To that end, Kohler further argues that

> If the beneficiary principle requires that all trusts be for persons, with the equitable interest necessarily vesting in those persons, the trust model will not provide a means by which communities can own assets and, at best, will only provide a cloak behind which individual members of the community will each own their shares in the asset.[64] Such a solution is incomplete and antithetical to the notion of communal property in which members' interests are derived from their status as members of the community and not because they own a vested interest.[65]

Nonetheless, Kohler suggests a solution to the incompatibility of vested interests and communal property. In *Re Denley's Trust Deed*, Goff J held that where a trust, though expressed for a purpose, was either directly or indirectly for the benefit of an individual or individuals, it would not fall foul of the beneficiary principle.[66] The aim of the beneficiary principle is to ensure that there is someone who is able to enforce the trustee's obligation.[67] Kohler seizes upon this and argues that, if a trust can be construed as being for the purposes of promoting the community's aims, the individual members of the community will qualify as persons with a sufficient interest to enforce

[62] *Morice v Bishop of Durham* (1805) 10 Ves 522.
[63] P Kohler, 'Common Property and Private Trusts' in Holder J and McGillivray D (eds), *Locality and Identity: Environmental Issues in Law and Society* (Dartmouth Publishing Co Ltd 1999) 230.
[64] Kohler notes that this is the solution that is adopted in unincorporated associations, which shall be discussed in the next chapter.
[65] Kohler n63 241.
[66] *Re Denley's Trust Deed* [1969] 1 Ch 373, 383-384.
[67] *Morice v Bishop of Durham* (1805) 10 Ves 522.

the trustee's obligations, yet they will not enjoy a vested interest in the property that they can sever and take for themselves.[68] As such, the aim of the beneficiary principle is met, as is the communal ownership requirement that there is no vested interest in any individual community member.

Therefore, if a trust was expressed to be for the purposes of furthering the aims of the community, as opposed to being a trust for the community members per se, *Re Denley* may operate to overcome the problems generated for the inalienability characteristic by the presence of vested interests. However, this potential use of *Re Denley* in itself raises two questions: first, who would be considered a direct or indirect beneficiary capable of enforcing the trustee's obligations, and second, are there any limits on the purposes for which the trust may be expressed.

With regard to the first question, Goff J said

> …there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would, it seems to me, apply to invalidate the trust.[69]

The 'standing' question is fairly easy to determine: those who meet the definition of community members, as set down by the community, will qualify. However, whilst that explanation provides some clarification as to who may qualify as a 'beneficiary', it does not clarify which test for certainty of objects should be applied. To that end, Goff J later expresses the view that as the trust being used is a private and not a charitable trust, the indirect beneficiaries must be capable of being listed,[70] limiting the utility of the *Re Denley* principle.

However, the editors of *Hanbury and Martin* argue that it is not necessary for a complete list of all the beneficiaries at any given time to be ascertained, and that the less stringent 'is or is not' test from *McPhail v Doulton*[71] should instead be applied to

[68] It is unclear if and how *Re Denley* can be squared with *Saunders v Vautier*.
[69] *Re Denley's Trust Deed* [1969] 1 Ch 373, 382-383.
[70] Ibid 386.
[71] [1971] AC 424, 454-456 (Lord Wilberforce).

a *Re Denley* trust.[72] That argument also appears to have traction with Kohler, who acknowledges that whilst Goff J is clear in his expression of the test for conceptual certainty of objects, that expression is arguably incorrect following the decision of the House of Lords in *McPhail v Doulton*.[73] As such, whilst there is an absence of clarity on the point, the dominant view appears to be that the class list rule should be applied, and it need only be possible to determine whether any given person 'is or is not' a member of the class of beneficiaries for the trust to have certainty of objects. Whilst it should be possible to list the members of the community who are direct or indirect beneficiaries of the trust's purposes, the 'is or is not' test provides some flexibility on this front. The likelihood of the trust failing for want of certainty of objects is decreased, increasing the likelihood that the trust securing the mutual self-interest common will succeed.

However, caution should be urged. The application of the 'is or is not' test to *Re Denley's* trusts will not always mean that trusts giving effect to communal ownership will be upheld. Trusts that fail for administrative unworkability cannot be saved by the *Re Denley* principle, as evidenced by *R v District Auditor Ex p West Yorkshire Metropolitan CC,*[74] in which it was held that *Re Denley* could not be applied to save a trust that had a class of 2,500,000 potential beneficiaries, given the unworkable size of the class. As such, a community that seeks to hold land through the use of a private trust needs to be small enough to be workable, but there is no definitive guidance on the upper limit of the membership of that community.

As to the second question, Kohler takes the view that the tone of Goff J's judgment suggests that his Lordship would not have needed much persuasion that a purpose is too abstract for the *Re Denley* reasoning to apply.[75] As such, expressing the trust to be for the purpose of 'furthering the aims of the community', without any further description or definition as to what those aims were, would probably be too ambiguous or abstract. It would be necessary to expressly state that the trust was for the purpose of securing a mutual self-interest common and, even then, it is not clear whether that

[72] J Glister and J Lee, *Hanbury and Martin Modern Equity* (Sweet and Maxwell 21ed 2018) 4-011.
[73] Kohler n63 241 fn63.
[74] [1986] RVR 24.
[75] Kohler n63 242.

would be too abstract. The only guidance to be drawn on the matter is that from *Re Denley*, where the purpose of the trust was expressed as being the provision of a sports ground for the benefit of the employees of a company. As Goff J allowed that purpose, a comparable level of clarity and specificity would be needed for any future trusts relying on *Re Denley*.

On balance, given the residual uncertainty surrounding the decision in *Re Denley*, caution should be urged against viewing it as the solution to the incompatibility of vested beneficial interests and the inalienability characteristic.

Conclusion

The private trust does not exhibit either limb of the inalienability characteristic. The ability to alienate trust property free of beneficial interests, and the vesting of beneficial trust interests in beneficiaries, cannot be overcome by infallible methods. The failure to exhibit the characteristic can be traced to the trust's role as a wealth management device concerned with furthering fungible interests. As long as the trust is committed to valuing the trust property as wealth, rather than for its utility, the trust will not exhibit the inalienability characteristic.

Perpetuity and intergenerational equality

The trust fails to exhibit the perpetuity and intergenerational equality characteristic, for two reasons. First, trusts are unable to enjoy a perpetual existence. Second, even if the trust could enjoy a perpetual existence, there are mechanisms through which the trust may be brought to an end.

Rule against perpetuity

Clarke notes that the forward-looking nature of a common-property regime encounters a 'technical problem' with regard to the private trust: the rule against perpetuity.[76] The perpetuity rule contains three limbs. First, the rule against the inalienability of capital renders a trust void if the trust property is to be held by the trustees for too long a period

[76] Clarke n2 355.

of time. Second, the rule against the remoteness of vesting renders the trust void if the interest will vest in the beneficiary at too remote a time in the future. Third, the rule against the accumulation of income prevents a trust from accumulating income for too long a period of time. The rationale behind these rules is to prevent land being tied up for too long, removing it from the general market, and to prevent those who benefit from such trust settlements from acquiring too much wealth. Rudden argues that the perpetuity rules are engaged whenever property is valued as wealth, rather than being valued as a thing.[77] Therefore, arguably, perpetuity is only an issue for the trust as a result of its commitment to valuing its assets as wealth.

The rule regarding the inalienability of capital is usually engaged in the context of private (non-charitable) purpose trusts. Nonetheless, the rule applies equally to all private trusts. The relevant perpetuity period is the common law rule of 21 years after the death of all 'lives in being' (discussed below). The rule is engaged in the context of a trust used to secure a mutual self-interest common as the natural consequence of the inalienability characteristic is that the trust capital is not exhausted, causing the trust to last indefinitely. Therefore, the rule regarding the inalienability of capital prevents the private trust from being used to secure a mutual self-interest common beyond the extent of the perpetuity period.

With regard to the rule against the remoteness of vesting, the primary issue is that, as the trust is for the benefit of the present and future members of the community, there will be beneficiaries that are not yet in being at the time the trust is created, and no guarantee that they will come into being. If it cannot be established that the beneficial interest will vest in the future members of the community at a time in the future that is not too remote, the trust is void. This is a problem for a trust used to secure a mutual self-interest common, as there should be an equality of benefit between all generations.

There are four perpetuity periods for the remoteness of vesting. For trusts created or taking effect on or after April 6 2010 the perpetuity period is 125 years,[78] unless the trust instrument states a shorter period over which the trust will exist (although the trust

[77] Rudden n4 82.
[78] Perpetuities and Accumulations Act 2009, s5(1).

instrument may not set a new perpetuity period),[79] or if the trust falls within the scope of section 12 of the Perpetuities and Accumulations Act 2009.

For a trust created or taking effect before April 6 2010 there are three different ways of ascertaining the perpetuity period. First, a maximum perpetuity period of 80 years could be stated in the trust instrument.[80] Second, if no perpetuity period is stated in the trust instrument, the common law sets the period as being 21 years after the death of 'all lives in being'. The common law rule is strict, and if there is a chance that the property will not vest within the perpetuity period, the trust is void, regardless of whether the property does in fact vest. Third, if the trust was created after 15 July 1964, and the trust would be void under the strict common law rule, the perpetuity period could end 21 years after the death of all statutory lives in being.[81] The Perpetuities and Accumulations Act 1964 benefits from the 'wait and see' rule[82] (as does the 2009 Act, which adopts the principle regardless of whether the trust would be void under the common law rule). The 'wait and see' principle dictates that, when it is unclear whether the property will vest within the perpetuity period, the trust shall be allowed to run for the perpetuity period, and all dispositions made under the trust shall remain valid. On the expiration of the perpetuity period, the trust comes to an end.

Whichever perpetuity period is applicable, it is clear that the private trust can only be a short-term solution to finding a legal institution to secure a mutual self-interest common. The trust cannot be used to hold the communal resource and secure the common-property arrangement for future generations beyond the applicable time limit. The termination of the trust leaves the common-property regime without legal recognition and protection, and removes the resource from the common pool, unless the trust is subsequently renewed.

The solution to the remoteness of vesting issue would be to settle the trust so that the property is held on trust for the present members of the community only. Settling the trust in that way will vest the entirety of the interest in those who are identified as

[79] Perpetuities and Accumulations Act 2009, s5(2).
[80] Perpetuities and Accumulations Act 1964, s1(1).
[81] Perpetuities and Accumulations Act 1964, s3(4).
[82] Perpetuities and Accumulations Act 1964, s3(1).

members of the community at any given time, even though the body of members may fluctuate. This solution is broadly in line with the *Re Denley* principle, where the body of employees able to enforce the trust obligations was liable to fluctuate, although in *Re Denley* it was held that no interest vested in any particular employee. However, the problem with settling the trust in such a way is that the entitlement of future generations is not protected in the same way it is when the trust is settled for present and future members. Therefore, when trustees are making decisions about the management of the trust property, they are not duty bound to consider the interests of future generations, and may manage the property in such a way that delivers a benefit to the present generation at the expense of future generations.

Termination of the trust

Even if a trust could exist in perpetuity, there are still ways in which it may be terminated, defeating the common-property regime, and preventing intergenerational equality of benefit. For example, pursuant to the rule in *Saunders v Vautier*,[83] in a private trust it is usually possible for the beneficiaries to bring the trust to an end and call for the transfer of the legal title to the property. For the rule to be utilised the beneficiaries must act unanimously, be *sui juris* and absolutely entitled to the trust property.

However, the rule in *Saunders v Vautier* cannot be used to vary the terms of a trust, or terminate it altogether, if it is impossible to obtain the consent of all the actual and potential beneficiaries. As such, if there are minor beneficiaries, beneficiaries with limited legal capacity, unidentifiable beneficiaries or beneficiaries not yet born, it is impossible to obtain the consent of all beneficiaries. Where the trust is used to secure a mutual self-interest common the trustees hold the resource on trust for the present and future members of the community, causing there to at least always be unborn persons in the class of beneficiaries. Therefore, the present beneficiaries would be unable to terminate the trust using the rule in *Saunders v Vautier*, limiting the threat of the rule to the perpetuity and intergenerational equality characteristic.

[83] (1841) 4 Beav 115.

That said, the Variation of Trusts Act 1958[84] gives the court a 'very wide, indeed, revolutionary discretion'[85] to consent to variations of a trust (but not resettlements) on behalf of beneficiaries who are themselves unable to consent.[86] However, the court's discretion is fettered, as it may only approve variations in so far as they are for the 'benefit' of the person on whose behalf it is consenting.[87] Therefore, unless the present beneficiaries of the trust are terminating with a view to creating a more favourable settlement, or making other beneficial variations, it is unlikely that the court will consent. As such, it seems highly unlikely that court will allow the present beneficiaries to terminate a trust securing a mutual self-interest common where that termination is to the detriment of future generations.

Finally, if, to avoid falling foul of the perpetuity rule, the trust was settled only for the benefit of the present members of the community, the community members would no longer be impeded by future beneficiaries not yet in being who are unable to consent, and the rule in *Saunders v Vautier* could be used. Nonetheless, the prospect of there being minor beneficiaries and beneficiaries lacking capacity still persists.

Termination of the trust: distribution of trust property

It is not only the termination of the trust that is incompatible with the perpetuity and intergenerational equality characteristic, but also the subsequent distribution of the trust property necessitated by the trust coming to an end. Distributing the communal resource will amount to an alienation that defeats the communal rights, and give a discrete share of the resource to community members or third parties, both of which are incompatible with a mutual self-interest common.

If a trust fails *ab initio*, such as, for example, breaching the perpetuity rules, the trust property is either returned to the settlor under a resulting trust, or will pass *bona vacantia* to the crown if it cannot or should not be returned to the settlor.[88] It is not

[84] The Act will be discussed in greater detail in the context of idiosyncratic regulation.
[85] *Re Steed's Will Trusts* [1960] Ch 407, 421-422 (Evershed MR).
[86] For a list of the beneficiaries on whose behalf the court may provide consent see s1(1)(a)-(d).
[87] Variation of Trusts Act 1958, s1(1).
[88] The nature and justification of resulting trusts are unsettled. Uncertainty remains as to whether a trust can fail *ab initio*, or whether the correct analysis is that a trust ever existed, therefore generating no trigger for a resulting trust. See W Swadling, 'Explaining Resulting Trusts' (2008) 124 *Law*

clear what should happen to the property if the trust runs the full duration of the perpetuity period under the 'wait and see' principle before coming to an end, rather than failing *ab initio*. It is possible that, as the trust has technically failed, a resulting trust will also arise. Alternatively, a different method of distributing the trust property may be employed.

Clarke suggests that when the trust comes to an end through the perpetuity rule (by which she presumably means the 'wait and see' principle), the trustees are under a duty to distribute the remaining trust property among the beneficiaries.[89] Ideally, the distribution will be detailed in the trust instrument but, failing that, the trustees are under a duty to act fairly and with impartiality between the beneficiaries. Therefore, in a trust where each beneficiary is equally entitled to the trust assets, as they are in a mutual self-interest common (subject to any shares being held as a tenancy in common), the resource must be distributed equally among the beneficiaries.

Equal distribution is difficult if the trust property is land, or another natural resource, as it is in a mutual self-interest common. Unlike money, shares, and other non-unique property, physical division of land into perfectly equal shares is impossible; each subdivided land parcel land will vary in quality, character and exchange or use value, and its value may also depend on its relationship with other subdivided parcels. Where an asset is physically indivisible, beneficiaries are equally entitled to the value of the asset, with no entitlement to have a specific parcel of land conveyed to them. Accepting that the communal resource should be distributed in this way also accepts that the beneficiaries' entitlement was always to a share of the value of the land, as opposed to the land itself. Once again, the role of the trust as a wealth management device appears to hinder its use in securing a mutual self-interest common, which is concerned with securing a community's right to the actual resource and its use, not its financial value.

The incompatibility between the termination of the trust, distribution of the trust property and the required characteristics of a mutual self-interest common may be

Quarterly Review 72 for a summary of the academic debate. The species of resulting trust considered at this juncture of the project is the 'automatic resulting trust', according to the definition of Megarry J in *Re Vandervell's Trusts (No.2)* [1974] Ch 269, which corresponds to Swadling's 'failed trust resulting trust'.

[89] Clarke n2 355.

resolved by adopting a doctrine similar to the *cy-prés* doctrine found in charity law. Under such a doctrine, when the trust terminates, the trust property is neither returned to the settlor or distributed among the beneficiaries. Instead, the property is applied to a purpose as closely related as possible to the purpose that it served under the trust. Therefore, under such a doctrine, the trust property could remain subject to communal use rights, rather than being privatised and removed from the common pool. For example, if the terminating trust had allowed the beneficiaries to use the land, *cy-prés* could apply the land for a related purpose, such as the recreational use of the beneficiaries, preserving the community's entitlement.

Developing a doctrine akin to *cy-prés* outside of charitable trusts is feasible, with progress already made in that direction through the development of asset-lock provisions. Asset-locks may prevent residual assets being transferred to private individuals by requiring their transfer to an organisation comparable to that which is being terminated, thus maintaining the community benefit derived from the resource. Asset-lock provisions are examined further in the context of companies in chapter four, and registered societies in chapter five, and those observations will not be repeated here.

However, an asset-lock or *cy-prés* mechanism would only mitigate some of the shortfalls of the trust in securing a mutual self-interest common. Such a doctrine would not address the issue of the perpetuity rule, or the ability to terminate the trust, and it is for those two reasons that the private trust does not exhibit the perpetuity and intergenerational equality characteristic.

Exclusion of non-members

The trust does, to some degree, exhibit the exclusion of non-members characteristic. A trust only confers rights on the beneficiaries. Therefore, where it is only community members who are beneficiaries, the trust confers no rights on non-members of the community; however, the exclusion characteristic requires more than this, and the community must enjoy all the exclusory powers of an owner.

Non-members of the community may enjoy rights over the trust property conferred by means other than the trust itself. For example, where the trust property is land, a non-member of the community may enjoy an easement. However, third-party rights do not themselves defeat the exhibition of the exclusion characteristic. Almost all privately owned land is subject to such rights; they are, given the scarcity and increased demand for land, a necessary feature land ownership in contemporary society, and are compatible with private ownership. As such, a third party holding a right over the trust land independent of the rights conferred by the trust does not prevent the exhibition of the exclusion characteristic. Instead, to enjoy the exclusory powers of an owner, the community must have the power to exclude non-members of the community who do not hold third-party rights, enforce against those who exceed the scope of their third-party rights or who interfere with the community's use of the land, revoke third-party use rights that are at law revocable, and grant third-party use rights.

It is the trustee, as the legal titleholder, who enjoys all the aforementioned legal powers. For example, it is the trustee who should bring an action in trespass against those who are using the land without the right to do so, or who are exceeding the scope of their rights, or commence an action in nuisance if the community's use of the land is interfered with. The beneficiaries may have some control or influence over the actions of the trustee, especially if the trustees are also members of the community and beneficiaries of the trust themselves, but have no direct powers of exclusion. If a trustee declines or neglects to bring proceedings to protect the property or the beneficiaries' interests, the beneficiaries may threaten, or actually bring, proceedings for breach of trust against the trustees to compel them to act. Again, this compulsion does not amount to a direct exclusory power, but does enable the community to exercise some control over the resource, especially in regard to the exclusion of non-members.

Notwithstanding the absence of legal titleholding, beneficiaries of a trust may, in some limited circumstances, exercise direct powers of exclusion. In particular, beneficiaries may themselves bring actions for trespass or nuisance against third parties to protect the resource and their entitlement to it,[90] especially where trustees are not inclined to

[90] Beneficial ownership of property is sufficient for a claim grounded in both the property torts and negligence: *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180 [151] (Waller LJ).

do so, although they would need to join the trustees as defendants if they will not participate as claimants.[91]

Therefore, the trust does, to a limited degree, exhibit the exclusion characteristic. Ordinarily it is the trustees who enjoy exclusory powers over the resource. However, the community members may influence the exercise of the trustee's powers. Alternatively, as beneficiaries of the trust, community members may occasionally commence proceedings to exclude non-members of the community from the resource if the trustees decline to do so, although it is anticipated that these instances will be the exception, not the norm.

Mutual self-interest

At the outset of this chapter public trusts were discounted as a viable legal institution to secure a mutual self-interest common. That assertion is made as the communal resource must be 'just as private to the community as private property is to the private property owner'.[92] As such, the resource must be managed in the interests, and for the benefit of, the community, without any concern for the interests of the wider public. Public trusts do not exhibit that characteristic.

On the other hand, private trusts do exhibit the mutual self-interest characteristic. Trustees are duty bound to manage the property according to the best interests of the beneficiaries, to the exclusion of all others. Indeed, consideration of the wider public interest when managing the trust property may amount to an improper consideration and breach of duty by the trustee, for which the beneficiaries may be entitled to seek a remedy.[93] Therefore, the resource is private to the community, and the mutual self-interest characteristic is exhibited.

[91] *Vandepitte v Preferred Accident Insurance Corp of New York* [1922] AC 70.
[92] Clarke n2 329.
[93] Examples of improper considerations for which beneficiaries may seek a remedy are most readily found in the context of the trustees exercising their general powers of investment, see for example *Cowan v Scargill* [1985] Ch 270.

Homogeneity of interest

The interests of trust beneficiaries are homogenous in that they are all the of the same nature: equitable beneficial interests. However, homogeneity in the scope and extent of the rights and interests enjoyed by each beneficiary is contingent on the drafting of the trust terms. For example, if the trust terms apportioned unequal shares in the resource amongst the beneficiaries, their interests could not be described as homogenous. Furthermore, wide drafting of the trust terms will facilitate disparate interests amongst the community, and inhibit the exhibition of the homogeneity characteristic. For example, if the terms of the trust were drafted in such a way as to permit beneficiaries' recreation and commercial gain from the property, the interests of the beneficiaries who enjoyed the land for recreational activities would not be homogenous with those who sought to use the land for commercial gain. In addition, facilitating wide and disparate interests of beneficiaries increases the likelihood of conflict amongst the beneficiaries, and may strain the exhibition of the community cohesion characteristic.

Therefore, the exhibition of the homogeneity characteristic is contingent on the drafting of the trust instrument, as whilst the nature of the beneficiaries' interests are homogenous, the extent and scope of those interests will vary according to instrument. As such, the private trust has the potential to exhibit the homogeneity characteristic, but whether it does in fact do so can only be assessed on a case by case basis.

Cohesive community

The trust does not exhibit the community cohesion characteristic, for two reasons. First, the institution itself does little to promote or discourage community cohesion; whilst the trust instrument will identify the community members as beneficiaries, the internal workings of the community, and the relationship between its members, is a matter for the community, and not one with which the trust mechanism is concerned. Arguably, the trust is unconcerned with cohesiveness amongst the beneficiaries as it is an example of a 'class action concept of collective rights'.[94] There is nothing inherently cohesive about the community; at its core, the community is just a group of individuals who happen to enjoy rights over the same property.

[94] McDonald n41 218.

Second, the selection of the beneficiaries is not determined by the trust institution, which is only there to protect the rights enjoyed by the named beneficiaries. Instead, the settlor selects the beneficiaries. Therefore, it is for the settlor to promote cohesion by applying appropriate eligibility criteria when defining the class of beneficiaries. Arguably, whilst the key criteria for beneficiary status should be community membership, that in itself does nothing to ensure the cohesiveness of the community. As such, the settlor should apply additional eligibility criteria, such as geographical proximity to each other and the communal resource,[95] when selecting the class of beneficiaries. Either way, it is not the trust institution that is promoting or securing the community cohesion, but an outside influence (the settlor) and, as such, the trust itself does not exhibit the characteristic.

However, cohesion amongst the beneficiaries will actually have little impact on the success of the trust when securing a mutual self-interest common. As it is not the beneficiaries who hold legal title to the property and directly manage it, their organisation and ability to co-exist harmoniously has a limited effect on the resource itself. Indeed, the trust is well suited to communities that are unable to organise and work together; the trust instrument details each beneficiaries' entitlement, and civil sanctions may be incurred should they be exceeded.

Nonetheless, whilst the trust is not concerned with the cohesiveness of the community, it can be argued that the private trust facilitates cohesion amongst the beneficiaries in a way that a public trust does not. When a community is of a manageable size and clearly defined, cohesion is more likely. To that end, the beneficiaries of a private trust belong to a smaller and defined group when compared to those in a public trust. Therefore, it is likely that in a private trust that there will be at least some cohesion amongst the beneficiaries, once again justifying the exclusion of the public trust as a means of securing a mutual self-interest common. However, on the whole, the trust institution itself does very little to exhibit the community cohesion characteristic.

[95] 'Introduction' p30.

Idiosyncratic regulation

It will be recalled that private contracts between community members were ruled out as a viable method of regulation in introduction to this project. Therefore, other means must be found.

As beneficiaries, community members have limited opportunity to devise idiosyncratic regulation regarding their use of the communal resource held on trust, the relationship between the beneficiaries, and the management of the trust property. It is the trustees who manage the trust property, although, where the trust property is land, the trustees have a duty to consult beneficiaries when exercising their management functions.[96] However, that duty only extends to the extent that it is practicable to do so,[97] and the majority wish of the beneficiaries is to be given effect only in so far as it is consistent with the general interest of the trust. [98]

Trustees must manage the property in accordance with the express terms of the trust instrument and their duties as trustees. Similarly, it is the trust instrument that dictates the extent of the rights enjoyed by beneficiaries, how those right co-exist and interrelate to the rights of other beneficiaries, and the terms of their relationship with each other. As such, the obvious way in which the community may devise idiosyncratic regulation governing a communal resource held on trust is to participate in the drafting of the trust instrument.

To that end, Clarke observes that '[l]egislation provides fairly rudimentary default provisions' with regard to the form that a private trust must take.[99] Therefore, at the point of settling the trust, there is a great deal of flexibility; the terms of trust can be drafted to meet the desires of the community with regards to the management of, and their access to, the resource. Short of drafting terms that contravene the perpetuity rule, there are few arrangements that would be prohibited.

[96] Trusts of Land and Appointment of Trustees Act 1996, s11.
[97] Trusts of Land and Appointment of Trustees Act 1996, s11(1)(a).
[98] Trusts of Land and Appointment of Trustees Act 1996, s11(1)(b).
[99] Clarke n2 355-56.

However, irrespective of the flexibility in drafting the trust instrument, there are two reasons why the trust does not exhibit the idiosyncratic regulation characteristic. First, the settlor determines the terms of the trust, and whilst they may consult the beneficiaries and trustees regarding the terms of the trust, there is no requirement to do so. In reality, it is unlikely that the terms of the trust would be decided in a vacuum and without some consultation with the beneficiaries; the trust is being settled for their benefit, and it is likely that the settlor is either a member of the community, or has a close relationship with it. Nonetheless, consultation with beneficiaries cannot be guaranteed, and beneficiaries have no right to determine the terms governing the trust and its property.

Second, the flexibility regarding the terms of the trust only exists at the point of settling the trust. It can be very difficult to alter the terms of the trust once it is established, especially if it is the beneficiaries who wish to make those variations in response to developing idiosyncratic rules. One option is to vary of the terms of the trust pursuant to the rule in *Saunders v Vautier*, although, as discussed earlier, the rule is of limited use where the trust is for the benefit of future generations yet to come into being. In addition, the rule requires that for beneficiaries to consent they must have reached the age of majority and be of sound mind. There will almost inevitably be members of the community who cannot meet these requirements, and who would be unable to consent to variations of the trust terms.

The court may consent to variations on behalf of children, those lacking mental capacity and unborn persons, either by exercising its inherent jurisdiction to do so,[100] or pursuant to powers conferred upon it by statute.[101] Of those statutory powers, the most widely used are found in the Variation of Trusts Act 1958. The settlor, trustee or beneficiary may make an application under the Act. Section 1(1) confers upon the court the power to approve any arrangement varying or revoking the trust, or enlarging the powers of the trustees in managing or administering the trust property on behalf of

[100] The court does not have the inherent jurisdiction to vary a trust in favour of children and unborn persons, see *Chapman v Chapman* [1954] AC 429.
[101] Trustee Act 1925, s57(1); Settled Land Act 1925, s64(1); Trustee Act 1925, s53; Matrimonial Causes Act 1973, s24 and 24A; Mental Capacity Act 2005, s18(1)(b).

> (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
>
> (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
>
> (c) any person unborn.

Section 1(1) further provides that 'the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person'. Ordinarily, in the context of a trust, 'benefit' is taken to mean financial benefit. However, in the context of a mutual self-interest common, the trust is not being used as a wealth management device. Therefore, 'benefit' would need to be interpreted more widely for variations on matters such as beneficiaries' entitlement to use the resource, or the preservation the resource for future generations, to be made. Once again, the trust's commitment to wealth management does not sit easily with it being used to secure a mutual self-interest common.

There are further practical difficulties in using the Variation of Trusts Act 1958. In particular, the settlor and all beneficiaries should be made parties to the litigation. Where the beneficiaries include children or those who lack mental capacity, a litigation friend is required pursuant to part 21 of the Civil Procedure Rules, and the Court of Protection may become involved. Consequently, the litigation required for the court to consent to such variations can be costly and cumbersome, and will probably be an inefficient tool for varying the terms of the trust. That inefficiency is magnified if variations are attempted frequently, as they may be in response to developing idiosyncratic regulation.

Nonetheless, one convenient by-product of using the Variation of Trusts Act 1958 is that the court's order approving the arrangement is deemed to be an 'instrument' for the purposes of section 15(5) of the Perpetuities and Accumulations Act 1964 and section 15(1) of the Perpetuities and Accumulations Act 2009. As such, the variation

effectively restarts the perpetuity period, and may enable the trust to secure the common-property arrangement beyond its original life expectancy, aiding the exhibition of the perpetuity and intergenerational equality characteristic.

Conclusion

The trust does not convincingly exhibit the idiosyncratic regulation characteristic. The scope for the community to devise regulation regarding the use and management of the communal resource is limited, and fraught with difficulty. The trust separates the management of the resource, which is conducted by the trustees, from the enjoyment of the benefit, the right to which is conferred on the beneficiaries. Therefore, the trust does not promote community self-regulation of the trust property.

Sanctions

The sanctions characteristic contains two limbs: mutual enforcement, and the ultimate sanction of exclusion. The exhibition of the sanctions characteristic is inherently linked to the idiosyncratic regulation characteristic, and the nature and source of that regulation. As such, the trust does not exhibit the sanctions characteristic.

Remedies against beneficiaries (community members)

The beneficiaries' rights and entitlement to the resource are dictated by the terms of the trust, which the beneficiaries have a limited role in drafting. As such, the extent to which beneficiaries are allowed to use the resource, for what purpose, and any limitations on what they may extract from the resource, should be set out in the trust instrument. If a member of the community breaches the terms of the trust, a cause of action may arise in favour of the other beneficiaries. In particular, a beneficiary exceeding the scope of their use rights may be liable for either trespass or nuisance if they should cause any interreference with the rights of other beneficiaries. For example, if the trust instrument entitles a community member to make use of the land for recreation, but they instead they use the land for commercial gain, they may be liable in trespass, as they have exceeded the scope of their permission. Alternatively, if a beneficiary conducts himself on the land in such a way as to interfere with other

beneficiaries' permitted use of the land, that person may find himself liable in nuisance. However, actions in trespass and nuisance do not exhibit either limb of the sanctions characteristic.

As discussed in the context of the exclusion characteristic, it is ordinarily for the trustee to commence proceedings against those allegedly liable in trespass or nuisance. Therefore, the obligations of beneficiaries are not mutually enforced. Nonetheless, if a trustee declines or neglects to commence proceedings, the beneficiaries may either threaten or actually pursue breach of trust proceedings against the trustees to compel them to act, on the basis that the trustees are not acting in the best interests of the beneficiaries. Alternatively, if the trustees will not bring proceedings, the community members may themselves bring the action against the rogue members of the community to seek a remedy,[102] and they would need to join the trustees as defendants if they will not participate as claimants.[103] Therefore, as community members are able to enforce, whether directly or indirectly, against others in breach of the terms of the trust, the mutual enforcement limb is arguably exhibited. However, enforcement by community members is not the default position, and usually only occurs if the trust relationship is not functioning properly. Therefore, the exhibition of the mutual enforcement limb is weak, and the exception rather than the norm.

Furthermore, remedies for trespass and nuisance do not extend so far as to exclude the offending community members from the resource. The primary remedy for interference with a property right is injunctive relief,[104] alongside damages necessary to compensate for any loss, with the possibility of damages being awarded in lieu of an injunction. Injunctive relief is exclusionary in so far as it prevents the continuation of the alleged trespass or nuisance. However, neither damages nor an injunction excludes the rogue community member from the resource; their entitlement to the resource is secured by their beneficial interest, with which remedies in damages and injunctions do not interfere. Therefore, the ultimate sanction of exclusion is not available for the breach

[102] Beneficial ownership of property is sufficient for a claim grounded in both the property torts and negligence: *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180 [151] (Waller LJ).
[103] *Vandepitte v Preferred Accident Insurance Corp of New York* [1922] AC 70.
[104] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13 [101] (Lord Neuberger).

of regulation contained in the trust instrument, and the second limb of the sanctions characteristic is also not exhibited.

Remedies against trustees

As the trustees hold the legal title to the communal resource, it is important that they are held accountable for their actions, as improper action on their behalf may destroy the resource and the common-property regime. Therefore, in the context of the trust, the sanctions characteristic must also be concerned with their behaviour.

To that end, trustees are subject to both trust and fiduciary duties, and will be liable for any breaches of those duties that cause the trust to incur a loss, or from which the trustee gains.[105] Breaches may occur in a variety of ways. For example, a trustee may act contrary to the terms of the trust, fail to act in accordance with their standard duty of care, or make an unauthorised profit or gain from her trusteeship. Liability for breach of trust is personal, and trustees are under an obligation either to restore the trust to the position it was in before the breach, or to account for any gains made through their trusteeship. In addition, proprietary remedies may be available to the beneficiary where the trustee is still in possession of trust property or its traceable proceeds and substitutes.

However, specific restitution of trust property will not always be possible, especially when a trustee has transferred the resource, or part of it, to an innocent third party. When specific restitution is not possible, the trustee must compensate for the value of the assets that have been wrongly transferred.[106] Whilst the personal nature of the remedy is useful as it does not rely on the trustee still having the trust property or its proceeds, financial compensation is inadequate as a remedy. The uniqueness of the resource is what makes specific restitution available in the first place, in the same way that the uniqueness of land makes available the remedy of specific performance for the breach of a contract formed under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. No amount of monetary compensation, even if calculated to the

[105] Defences to such breaches include beneficiary acquiescence to breaches of trust, see *Re Pauling's Settlement Trust* [1962] 1 WLR 86.
[106] *Target Holdings v Redferns* [1996] AC 421, 434 (Lord Browne-Wilkinson).

exact value of the resource, would replace the loss of amenity to the community.[107] In addition, the assumption that financial compensation is a suitable alternative again highlights the trust's typical use as a wealth management device, and the view that the beneficial interest is in the value of the property, as opposed to the property itself.

III. CONCLUSION

Clarke argued that the private trust has become one of the primary methods of communal resource holding, but that it is not designed for this purpose.[108] Indeed, none of the ownership vehicles examined in this project were designed or intended to be used to secure a mutual self-interest common. However, in the absence of a legal institution designed specifically for such a purpose, it is necessary to manipulate the institutions that are available to achieve the desired ends.

The private trust exhibits very few of the eight key characteristics of a mutual self-interest common. Three characteristics are exhibited to a very limited degree: the exclusion of non-members, homogeneity of interest and idiosyncratic regulation. Only one characteristic, mutual self-interest, is convincingly exhibited.

The private trust's failure to exhibit the remaining characteristics can largely, but not wholly, be attributed to the trust being a wealth management device that values the trust property as wealth, as opposed valuing it as a thing. In contrast, a mutual self-interest common is concerned with a community's relationship with a particular resource, and therefore values the intrinsic qualities of the thing, rather than its financial value. As such, the trust is ill-suited to securing a mutual self-interest common. In particular, the trust's wealth management outlook precludes the exhibition of the inalienability and perpetuity and intergenerational equality characteristics. Specifically, understanding the trust asset as wealth facilitates alienations that defeat the beneficial interests of the community, whilst also vesting individual members of the community with an interest in the communal resource that they may opt to treat as their own. In addition, understanding the trust as a wealth management device engages

[107] The loss of the resource itself also destroys the intergenerational equality of benefit derived from the resource.
[108] Clarke n2 350.

the perpetuity rules, preventing the perpetual existence of the trust and the securing of intergenerational equality of benefit. If the private trust is to be used successfully as a means of securing a mutual self-interest common, the trust concept needs to be reconsidered, and the asset valued as a thing, rather than as wealth.

Overall, in light of both the technical and conceptual difficulties faced when using the private trust to secure a mutual self-interest common, alternative means should be sought to achieve those ends. This project shall now turn to considering an alternative, yet linked, option: the unincorporated association.

Chapter 3 | UNINCORPORATED ASSOCIATIONS

The private trust is not the only equitable device that can be used to secure a mutual self-interest common. Equity intervened in response to the issues generated by many clubs and societies not having legal personality, but frequently having assets considered to be 'theirs', as well as being the recipients of gifts and legacies. That response was to recognise the ability of unincorporated associations to hold and manage property through the use of the bare trust.[1]

Unincorporated associations fall into the category of ownership vehicles. As with the trust, the membership of an unincorporated association must mirror the membership of the mutual self-interest community for it to work as a method of securing a mutual self-interest common.

This chapter shall first outline the key features of an unincorporated association. It shall then demonstrate that the unincorporated association exhibits some of the eight required characteristics of a mutual self-interest common. However, as the unincorporated association has a close relationship with the private trust, it is unable to exhibit all of the required characteristics, struggling most notably with the inalienability and perpetuity and intergenerational equality characteristics.

I. UNINCORPORATED ASSOCIATIONS

Unincorporated associations are non-profit making organisations. Lawton LJ defined unincorporated associations in *Conservative and Unionist Central Office v Burrell (Inspector of Taxes)* as

> …two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or

[1] Whilst presented as a solution to the property holding problem, unincorporated associations still do not enjoy a legal personality distinct from its members.

> left at will. The bond of union between the members of an unincorporated association has to be contractual.[2]

The dominant theory of unincorporated associations, and the one adopted by this project, is the 'contract holding theory'. Pursuant to that theory, Cross J explains that the existing members of the association hold the property

> …not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift [or any receipt of property] took effect. If this is the effect of the gift [or receipt of property], it will not now be open to objection on the ground of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity.[3]

It is assumed that the treasurer, or another officer of the association, will hold the legal title to the property on trust for the benefit of the present members of the association, subject to the rules of the association.[4] The rules should make provision for:

- Name
- Objectives
- Subscriptions (if any)
- Official positions within the association
- Holding of the property, including any restriction on the trustees
- Meeting of the general membership and committees
- Requirements for membership
- Voting rights
- Amendment of the rules
- Distribution of assets on dissolution.[5]

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[2] [1982] 1 WLR 522, 525.
[3] *Neville Estates Ltd v Madden* [1962] Ch 832, 849, as affirmed in *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch).
[4] *Re Buckinghamshire Constabulary Widows' and Orphans' Fund Friendly Society (No2)* [1979] 1 WLR 936, 939-940 (Walton J).
[5] N Stewart QC et al, *The Law of Unincorporated Associations* (Oxford University Press 2011) [2.18].

The rules of the association do not need to be in writing, although it is helpful if they are. Where a rule is not in writing, and a member asserts that a particular practice or custom has the status of a rule, it is for them to establish that the practice or custom is settled and accepted by the other members so as to be a contractual provision.[6]

Trust relationship

In light of the foregoing, where a community meets the definition of an unincorporated association, the property of that community is held on bare trust for the present members of the community, subject to the rules of that community. As such, the private trust is at the heart of the unincorporated association.

Chapter two highlighted that the primary barrier to using the private trust as a means of securing a mutual self-interest common was its valuing of trust assets as wealth, as opposed to valuing their intrinsic qualities as things. Given its reliance on the trust, it is likely that the unincorporated association will also be impeded in the exhibition of the required characteristics for the same reason. Nonetheless, as unincorporated associations map their own legal framework on top of the trust, they are different enough that they should be considered separately to the trust, and assessed against the eight required characteristics in their own right. In particular, the non-profit making element of the unincorporated association model may mitigate the shortfalls of the private trust's valuing of community assets as wealth, rather than for their intrinsic value and qualities as things.

Community right-holding

Even though a trust is still needed to enable its property holding, it is arguable that the unincorporated association is not an example of McDonald's 'class action concept of collective rights'.[7] There are two justifications for this argument.

[6] *Abbott v Sullivan and Others* [1952] 1 KB 189.
[7] M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218. See 'Introduction' pp20-21.

First, the community is more than a group of similarly situated individuals who hold the same rights over a resource and exercise them in common with one another. It is the status of being a community member that confers rights to the property and, should an individual cease to hold that status, the rights are lost. As such, it can be argued that it is in fact the community that holds the right to the resource, with those rights exercisable by the membership at any given time.

Second, unlike the trust, an unincorporated association does not unilaterally confer rights on community members. Instead, community members must decide whether to accept the benefits (and obligations) conferred by membership of an association, and join the association according to its rules. As such, it can be argued that an unincorporated association is more than a group of similarly situated individuals. The mutuality of benefits and obligations binds the community members together to share an identity, rather than each member being an individual right holder independent of all others.

The use of the unincorporated association

Owing to its reliance on an underlying trust, the unincorporated association is probably best suited to securing mutual self-interest commons in circumstances similar to those in which the trust is best used.[8] Therefore, the unincorporated association is best suited to instances in which title to the communal resource (such as a local green space) is owned by a community member or, at the very least, someone who is sympathetic to the community's use.

However, two key differences exist in the use of the trust and unincorporated association when securing a mutual self-interest common. First, the unincorporated association assumes a degree of organisation amongst community members, as they must come together to formalise their relationship and form the association. Second, where a community has formed an association, notwithstanding the association's underlying reliance on the bare trust, it may not be appropriate, or legally sound, for the owner of the communal resource to simply declare that they hold it on trust for the members of the association. Instead, the nominated officer(s) of the unincorporated

[8] 'Trusts' pp48-49.

association hold its property on trust for its members, and it is them to whom the legal title should be transferred for such purposes. Therefore, there is a much stronger sense of the property being 'given' to a community when using an unincorporated association as an ownership vehicle as, unless the owner of the resource is the relevant officer of the association, a transfer of title will probably have to occur.

Examples of the arrangements described above include instances in which the residents of a road formalise their community relationship by forming a residents' association. If the members of the community made use of a green space, the title to which was held by a community member or someone sympathetic to the community's use, they may transfer the title to the land to the residents' association so that it may be held by the nominated officer(s) for the benefit of the members of the association.

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

As the property holding of the unincorporated association relies on the bare trust, the issues raised in chapter two regarding alienations of the trust property apply equally to the unincorporated association.[9] The only difference is that, in the bare trust, the trustee is not subject to the duty to invest the property.[10] Instead, their role and function is to do little more than hold the legal title, and bring actions in tort if the property is damaged, interfered with or misappropriated.[11] Therefore, the likelihood of the property being alienated so as to defeat the communal rights is lessened, although it is still a possibility, and the danger of overreaching still persists. On the whole, restrictions recorded against the legal title prohibiting or limiting dispositions would still be the most effective way of preventing alienations that defeat the communal rights.

[9] 'Trusts' pp49-52.
[10] This accords with the unincorporated association being used as a legal form for non-profit making organisations.
[11] The trustee is also likely to be subject to other duties in their role as an officer of the association, even though their trustee duties are more limited than they would be in an ordinary private trust.

Severance and alienation of a discrete share

Chapter two identified the trust's vesting of equitable interests in the beneficiaries, and the beneficiaries' ability to sever and alienate that interest, as the primary barriers to using the private trust as means of securing a mutual self-interest common. The unincorporated association is not a complete solution to these problems, as the beneficial interest in the property is still vested in the present members of the association, unless of course the *Re Denley's Trust Deed*[12] principle can be applied.[13]

Furthermore, as the unincorporated association relies on the bare trust, the rules against perpetuity, including the rule against the inalienability of capital, are still engaged. It is the rule against inalienability that causes Cross J to make clear that, in an unincorporated association, any restraint on severance is only contractual in nature.[14] It is possible for the restraint to be removed by the members of the association, and for them to take their share of the property. If the restraint on alienation was a property rule that the members could not remove, an unincorporated association's property holding would fall foul of the rule against inalienability.

Matthews explains the effect of the contractual restraint on severance in an unincorporated association, albeit in the context of a gift being made to the association, in the following way

> If the members can by their own agreement--and not that of the donor--throw off the restraint, then prima facie it is not a limitation inherent in the nature of the property itself. It would seem instead to be a self-imposed fetter having nothing to do with the property given. If, on the other hand, the members cannot effectively agree to get rid of the restraint, so that it *must* be devoted to the original purpose, then it does not belong to them as does the other property of the association, and it must be property to which the rule in *Saunders v. Vautier* will never apply. In short, it is not for beneficiaries, but for a purpose.[15]

[12] [1969] 1 Ch 373.
[13] 'Trusts' pp56-59.
[14] n3.
[15] P Matthews, 'A Problem in the Construction of Gifts to Unincorporated Associations' [1995] 59 *Conveyancer and Property Lawyer* 302, 305-306.

As such, the unincorporated association is still a 'cloak behind which individual members of the community will each own particular shares in the asset'[16] even if it is the case that they only enjoy that vested interest as a result of their status as community members, and will lose that interest should they cease to hold that status. The restraint on severance and alienation can be overcome, and the members of the community still enjoy a vested interest in the property, and are able to take their share. Kohler comments that this is the 'result of applying private property thinking to the essentially communal property scenario', and that the unincorporated association ends up being a 'wholly unconvincing fudge'.[17] That fudge ensures that the unincorporated association does not exhibit either limb of the inalienability characteristic.

Perpetuity and intergenerational equality

An unincorporated association may enjoy a perpetual existence, with members joining and leaving the association according to its rules, until such time as the current members decide to dissolve the association.[18] However, as noted above, the property holding of the unincorporated association is subject to the rules against perpetuity. Therefore, as with the private trust, the unincorporated association's members must be able to take the property for themselves either before or on the expiration of the perpetuity period.[19] As such, it is impossible for the property to be held on trust perpetually for the members of the association, and the perpetuity and intergenerational equality characteristic is not exhibited.

Furthermore, the property of the unincorporated association must necessarily vest in the present members of the association so as not to be void for perpetuity. That vesting causes two additional problems for the perpetuity and intergenerational equality characteristic.

[16] P Kohler, 'Common Property and Private Trusts' in Holder J and McGillivray D (eds), *Locality and Identity: Environmental Issues in Law and Society* (Dartmouth Publishing Co Ltd 1999) 241.
[17] Ibid 246 fn57.
[18] *Re Taylor* [1940] Ch 481.
[19] It is common for the rules of the association to dictate that property may only be distributed amongst the members upon the dissolution of the association. If such a rule were present, the society would not enjoy a perpetual existence.

First, as the property is vested in the present members of the unincorporated association, it is necessary for future generations of the community to join the association before they can enjoy rights over that property. Whilst status as a member of the community, as opposed to any personal entitlement, is the correct and proper way to determine who should enjoy rights over the property,[20] as nobody has a right to join an unincorporated association,[21] the position of future generations is precarious. Future members do not have any automatic entitlement to the property that crystallises upon their coming into being as they would with a trust settled for the benefit of present and future members of a community.[22] Even in an association where the rules state that the benefit of the association should be received as a third party, those persons are not considered members of the association with rights over the property.[23] Instead, future generations of a community must actively join the association in line with its rules, and undertake to observe its mutual contractual obligations. Whilst those rules may, in most cases, be little more than a formality, and, in reality, all de facto community members are accepted, the process generates an additional hurdle. Furthermore, in some cases, the need to make an application to join the association may result in valid members of the community not being admitted to the association and enjoying an entitlement to the resource. Even if an application to join the association is made by a person who complies with the rules, the applicant need not be accepted into the association, provided that the basis for rejecting the applicant does not amount to unlawful discrimination and the decision-making process itself was in accordance with the rules of the association.[24] There is no obligation to give reasons for any decision made in respect of an application to join, and the applicant has no recourse to the courts as no contractual relationship arises before they have joined.[25] Finally, as joining the association entails an undertaking to be bound by contractual obligations, only those who have attained an age at which they can understand the nature of those obligations

[20] Kohler n16 241. Contrast also with the 'class action concept of collective rights' put forward by McDonald n7 218. As rights to the property are only acquired as a result of formal community membership, and are lost upon leaving the community, it can be argued that the unincorporated association is more than an example of the 'class action concept of collective rights'.
[21] Stewart QC et al n5 [2.91]. See also *Chamberlain v Boyd* (1883) 11 QBD 407.
[22] Although it is still recognised that the 'future members' aspect of the private trust will be void for perpetuity.
[23] *Re Buckinghamshire Constabulary Widows' and Orphans' Fund Friendly Society (No2)* [1979] 1 WLR 936.
[24] Stewart QC et al n5 [2.119].
[25] Ibid [2.118]-[2.119].

may join. That leaves a class of persons (very young minors) who should benefit from the resource according to the principle of intergenerational equality without any entitlement to the resource whatsoever.

Second, as the beneficial entitlement to the property is vested in the present members of the society, those members are treated together as absolutely entitled to the property. Consequently, they may bring the bare trust to an end pursuant to the rule in *Saunders v Vautier*[26] and take their beneficial share of the property. That ability to bring the property holding to an end means that the unincorporated association, like the private trust, cannot exhibit the perpetuity and intergenerational equality characteristic. It is possible, and indeed necessary to avoid falling foul of the perpetuity rules, that the property can be removed from the common pool and divided amongst the present members at the expense of future generations.

Finally, as with the private trust, if an unincorporated association comes to an end, it is necessary to deal with the association's property. If the association terminates by agreement of the members, the property will be dealt with according to the rules of the association. If the rules do not make provision for distributions, each member is entitled to an equal share of the assets.[27] If the association instead terminates because all but one member of the association has died or resigned, the sole remaining member will take the assets absolutely.[28] Irrespective of which method of distribution is used, apportioning the asset and distributing private shares removes it from the common pool, and prevents future generations from benefitting as past and present generations have.

In summary, the unincorporated association fails to exhibit the perpetuity and intergenerational equality characteristic. Underpinning the unincorporated association with a private trust ensures that the perpetuity rules and the problems generated by vesting interests are engaged. Furthermore, the need to actually join the society, whilst potentially aiding the cohesiveness of the community and its function as a right holder,

[26] (1841) 4 Beav 115.
[27] *Re St Andrew's Allotments Association's Trusts* [1969] 1 WLR 229.
[28] *Hanchett-Stamford v Attorney General* [2008] EWHC 330 (Ch).

presents an additional hurdle for intergenerational equality, as some future generations may be excluded from the benefit of the resource.

Exclusion of non-members

The present members of the unincorporated association are the beneficiaries of the bare trust in which the property is held. Therefore, where the membership of the community is reflected in the membership of the unincorporated association, only the community members enjoy the beneficial interest to the trust property, with legal title held by the trustees. As such, there is nothing more to add to the analysis of the exclusion characteristic that has not already been covered when discussing the private trust. The characteristic is, in part, exhibited.

Mutual self-interest

Similarly, as a private trust is at the heart of the unincorporated association, the mutual self-interest characteristic is exhibited. The property is held and managed for the benefit of the present members of the community, as opposed to the public generally. There is nothing to add to the analysis conducted in chapter two.

Homogeneity of interest

The unincorporated association exhibits the homogeneity of interest characteristic to an even greater degree than the private trust. As with the trust, the nature of the community members' interests are the same, and can be described as homogenous. Furthermore, the requirement that members must sign up to the rules of the association ensures that the interests and motives of the community members are homogenised. The rules of association must state the objective, or objectives, of the association, and signing up to the rules is a contractual commitment to those. All community members will strive to meet the same ends with regard to the resource as a result of the contractual obligations, and any unwillingness to follow those obligations will result in their application for membership being rejected, or sanctions should those obligations not be followed once admitted as a member. Therefore, even if a community member held desires for the property that were incompatible or outside of the rules of the association, they would not be able to pursue them.

Cohesive community

Unlike the private trust, community cohesion is inherent in the nature of the unincorporated association, and the characteristic is exhibited. The act of coming together to agree on a body of rules by which the association is governed, and to which members are contractually bound, requires a level of organisation and cohesion that would not be exhibited by a dysfunctional group. Indeed, unincorporated associations appear to epitomise Clarke's statement that the cohesiveness of the community provides both the means and the method for promoting the mutual self-interest.[29]

Cohesiveness has long been recognised as a key feature of the unincorporated association. Lord Romilly MR recognised as far back as 1867 that 'there should be a good understanding between all members, and that nothing should occur that is likely to disturb the good feeling that ought to subsist between them.'[30] His Lordship made this statement in light of his opinion that unincorporated associations are primarily for social purposes, and specifically for gentlemen's clubs. However, the statement seems to hold true for unincorporated associations more generally; it is difficult to envisage an association being established, and its rules settled, without there being a good understanding and feeling existing between members. Therefore, where a community making use of a communal resource is able to formalise its relationship as an unincorporated association, the community must be inherently cohesive.

Furthermore, it is likely that, once established, an unincorporated association will continue to maintain its cohesive character. As the rules of association will dictate who is eligible as a member of that association, the existing members of the association have control over who can be admitted; they are able to admit only those who share relevant objective and subjective characteristics with themselves. Therefore, where a community making use of a communal resource is an unincorporated association, the community can maintain its cohesive nature by controlling and limiting admission only to those who are bona fide members of the community, and who are willing to participate in the spirit of the regime.

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[29] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 329-330.
[30] *Hopkinson v Marquis of Exeter* (1867) LR 5 Eq 63, 67 (Lord Romilly MR).

Idiosyncratic regulation

The unincorporated association is a natural model for self-governance and, exhibits the idiosyncratic regulation characteristic, for three reasons.

First, an unincorporated association, and its property holding, are governed by its rules of association, which fulfil much the same function as articles of association in a company. However, unlike a company, there is no default statutory model for the rules of association;[31] in fact, there is no statutory control over unincorporated associations at all. There are model rules of association drafted by law firms and bodies such as the Charity Commission freely available on the internet that may be adopted, or from which inspiration can be drawn, but these are not binding default provisions. Instead, it is for the community to draft their own rules of association. The rules may include anything that is not contrary to the ordinary principles of contract law, or which will cause the perpetuity rules to be offended. As such, community members have a vast freedom to set the rules of the association regarding the use and management of the resource.

However, a note of caution is urged. Whilst the absence of statutorily prescribed rules aids the exhibition of the idiosyncratic regulation characteristic, it may also generate practical problems for a community. Drafting entirely bespoke rules from a blank canvas may prove expensive, and require the services of specialist draftsmen and legal advisers. If such costs do prevent the drafting of idiosyncratic rules, an association may elect to adopt the model rules referred to above, which cannot be described as idiosyncratic, or adopt rules that are incomplete and ineffective.

Second, as the idiosyncratic rules of the association are contractual, it is also possible to change those rules to reflect the desires within the community regarding the use, management and governance of the resource without having recourse to the courts, the rule in *Saunders v Vautier* or the limited statutory powers in the Variation of Trusts Act 1958, or encountering the complications that these present. Rule changes may take

[31] It is possible for companies to draft their own articles of association or, more commonly, amend the default articles to meet the needs of the company.

place either by the mutual consent of all the contracting parties,[32] or in accordance with any provision for rule changes within the rules themselves. For the sake of practicality, it would be desirable for the rules to contain provision for their amendment, as whilst the community must be small enough that it is not administratively unworkable, it is likely to be large enough to make seeking the consent of every member onerous. In addition, unless there is a clear procedure through which rules may be amended, the costs of amending the rules to reflect developing idiosyncratic practices may escalate, and prove prohibitively expensive for some communities.

Third, the contractual obligations of the unincorporated association are a much more effective means of devising idiosyncratic regulation than a series of private contracts between individual members, which was ruled out as an option in the introduction to this project. In particular, as undertaking to abide by the contractual obligations is a pre-requisite to joining the association, all community members are bound by the regulation, and the problem of hold outs disappears. Furthermore, individuals contract with the association, with the association being the sum of its members, as opposed to contracting with each and every member directly. Therefore, the practical problems associated with creating the web of individual contracts that would be needed to bind all community members, such as cost and time expenditure, are not a factor in an unincorporated association.

On the whole, the unincorporated association exhibits the key characteristic of idiosyncratic regulation. Subject to costs, the members of an association are free to set and alter the rules of the association, including rules regarding the use and management of its property. The only matter taken out of the community's hands are the legal rules that govern the bare trust on which the property is held.

Sanctions

The sanctions characteristic has two limbs: mutual enforcement and the ultimate sanction of exclusion. Unlike the private trust, the unincorporated association exhibits both limbs.

[32] *Reel v Holder* [1981] 1 WLR 1226, 1231 (Lord Denning MR).

First, as the idiosyncratic regulations of an unincorporated association are contractual, it is only the parties to the contract that may sue on that contract for its breach. The unincorporated association itself does not have legal personality,[33] and it is for its members to personally enforce the rules of the association against those who do not comply. The enforcing members may turn to the courts for assistance when seeking to enforce the contractual obligations, but it is for the members to identify the breaches and bring proceedings. As such, the first limb of the sanctions characteristic is exhibited.

Second, unincorporated associations have the power to discipline and even expel members in so far as it is necessary for the 'due administration and harmonious working' of the association.[34] The most common ground for expulsion is that a member's conduct is detrimental or injurious to the character or interests of the association.[35] However, whatever the ground for discipline or expulsion, the power to take such action must be clearly provided for in the rules of the association.

Where a community is an unincorporated association, an individual's exclusion from that association will amount to exclusion from the communal resource, as they enjoy rights over the resource only whilst a community member. It is for that reason that any powers of expulsion or other disciplinary action should be exercised in accordance with the rules of the association,[36] as the loss of rights upon expulsion from the association is significant.[37] As discussed in chapter two, the ultimate sanction of exclusion was not exhibited by the private trust as the beneficiaries of the trust enjoyed an entitlement to the property that was independent of their status as a community member; the community is unable to affect a member's entitlement to the property as a beneficiary of the trust.[38] The unincorporated association does not suffer from the same problem as the private trust; revocation of status as a community member will revoke all rights

[33] An unincorporated association does, in some instances, have legal standing. For example, a Neighbourhood Forum, which may be an unincorporated association, may prepare a neighbourhood plan pursuant to the Localism Act 2011.
[34] *Andrews v Mitchell* [1905] AC 78, 82 (Lord Davey).
[35] Stewart QC et al n5 [6.06].
[36] Ibid [6.08].
[37] *John v Rees* [1970] Ch 345, 397 (Megarry J).
[38] 'Trusts' p74.

over the resource, and amount to exclusion. As such, the second limb of the sanctions characteristic is also exhibited.

III. CONCLUSION

Whilst still relying on the bare trust for property holding, the unincorporated association provides a solution to some of the shortfalls experienced by the private trust when it is used to secure a mutual self-interest common. In particular, the unincorporated association strongly exhibits the community cohesion, idiosyncratic regulation and sanctions characteristics as a result of the contractual rules of association.

Nonetheless, the unincorporated association still does not exhibit the inalienability and perpetuity and intergenerational equality characteristics. As the private trust is at the heart of the unincorporated association, the problems generated by vested interests and the perpetuity rules persist, and these two characteristics cannot be met. It is undeniable that, by a community forming an unincorporated association, the private trust becomes a more effective means of communal property holding. However, all the time the trust continues to value assets as wealth, as opposed to things with their own intrinsic value and qualities, any device relying on the trust will fail to properly secure a mutual self-interest common.

Chapter 4 | COMPANIES

The third legal institution and ownership vehicle examined by this project is the company. If using a company to facilitate a community holding title to a mutual self-interest common, the membership of the community must be mirrored in the membership of the company.

In her 2006 study, Clarke briefly examined the company as an ownership vehicle.[1] She concluded that '[t]here are several aspects of the corporate form that make it inappropriate – although not necessarily unworkable – for communal resource holding.'[2] However, Clarke's study makes no reference to the Companies Act 2006. The Act is the primary source of company law, and received Royal Assent on 8 November 2006, shortly before Clarke's study was published. Therefore, Clarke's conclusions should be reviewed in light of the 2006 reforms. Furthermore, Clarke does not consider the different company formats, and instead examines the corporate form as a whole. This chapter distinguishes between the different company formats available in English law, and chapter five considers two further corporate forms that Clarke did not consider: co-operative and community benefit societies.

This chapter will first outline the various company formats in English law. It will then demonstrate that, whilst the company, as a legal institution, may in principle exhibit some of the eight characteristics of a mutual self-interest common, whether a particular company does in fact exhibit those characteristics will depend on its constitution. The flexibility afforded to companies with regard to their constitution is both a strength and a weakness; the constitution may include provisions that aid the exhibition of the required characteristics, but, equally, the inclusion of those provisions and the exhibition of the characteristics are not guaranteed.

[1] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 350-35.
[2] Ibid 350.

I. COMPANIES

There are several variations of the company format in English law. Each of those companies is either a private or public company.

The public company is excluded from the scope of the inquiry in this project, which instead considers only the private company. The public company is excluded because it is of limited use in securing a mutual self-interest common. Contrary to the rules for private companies, shares in a public company may be offered to the public.[3] As such, the members of a public company may not always be drawn from an exclusive class of persons, such as a community. Conversely, shares in a private company are not offered to the public, and are instead offered to individuals as a private concern. Consequently, the members of the company may be drawn from an exclusive class, such as a community, which better reflects the limited-access nature the common.

Private companies

The term 'company' is generic, and refers to several variations of the private company format. Each format has its own idiosyncrasies that must be understood before analysing their suitability as an ownership vehicle for a mutual self-interest common. The three private companies of particular interest are companies limited by shares, companies limited by guarantee, and community interest companies.

The three companies of interest are all limited liability companies.[4] Private companies may be established as limited or unlimited liability.[5] The vast majority of modern companies are established as limited liability, with the 2017/218 Companies House register showing only 4374 private unlimited companies, which equates to 0.1% of all registered corporate bodies.[6] The prevalence of the limited liability company is accounted for by its self-evident attraction: members are only liable for a limited amount of the company's debts on winding up, and often that amount will be nominal.

[3] Companies Act 2006, s755(1).
[4] A community interest company may be either a company limited by shares or guarantee.
[5] Companies Act 2006, s3.
[6] Companies House, *Companies Register Activities 2017 to 2018* (28 June 2018).

Indeed, limited liability is such an advantage that it is often said to drive entrepreneurs' decisions to incorporate.[7]

However, whilst the limited liability company may be an advantage to entrepreneurs, Clarke's view is that limiting the liability of members is inappropriate in the context of communal resource holding.[8] In particular, she notes that the concept of limited liability was developed during the industrial revolution to allow individuals to ring-fence portions of their wealth for specific commercial projects, and that non-commercial communal resource holding requires a greater commitment from members.[9] Furthermore, limited liability does not operate as a risk-spreading device, which, as was established in the introduction to this project, is often the motivation for adopting a common-property regime.[10]

Companies limited by shares

Sections 3(1) and 3(2) of the Companies Act 2006 ('CA 2006') provide for companies limited by shares ('share company'). In a share company, members subscribe for shares and their liability to contribute towards the company's debts is limited to the value of their subscription. In practice, the value of the shares is often 'paid up' (paid for) at the time of subscription, and there is nothing additional to pay if and when the company is wound up.[11] In addition, the members' paid up subscriptions float the company on its launch; however, as there is no minimum capital requirement for private companies, members' contributions to the initial financing of a company are often very small.

The share company is the most popular form of company, and accounted for 92.7% of registered companies in 2017/2018.[12] The share company's popularity is probably due to it being the preferred format where the primary purpose of the company is to carry on a business for a profit and to divide that profit amongst the members. In light of the

[7] PL Davies and S Worthington, *Gower Principles of Modern Company Law* (Sweet and Maxwell 10ed 2016) 1-27.
[8] Clarke n1 350-351.
[9] Ibid 351.
[10] 'Introduction' p7.
[11] Companies Act 2006, s3(2) and the Insolvency Act 1986, s74(2)(d).
[12] Companies House, *Companies Register Activities 2017 to 2018* (28 June 2018).

typical use of the share company, it is unlikely that it will be the best company format for the purposes of securing a mutual self-interest common.

Companies limited by guarantee

Sections 3(1) and 3(3) of the CA 2006 provide for companies limited by guarantee ('guarantee company'). Instead of limiting a members' liability according to the amount payable on their shares, a guarantee company limits liability according to an agreement that, if the company is wound up, each member will provide an amount to satisfy its debts. The amount agreed is often nominal, and only needs to be provided upon the winding up of the company.[13]

Guarantee companies are less popular than share companies. In 2017/2018 only 3.5% of all registered companies were guarantee companies.[14] Guarantee companies are typically, although not exclusively,[15] used for not-for-profit activity; the format is particularly popular with charities, clubs and associations, free schools, academies, trade associations and registered providers of social housing. Where a company undertakes non-profit making activity there is no need for members' undertakings to be divided into shares, as there is usually no profit to be distributed according to the value of a shareholding. Nonetheless, any profit made by a guarantee company may be distributed amongst the members if permitted by the articles of association. Furthermore, as members do not subscribe for shares, there is no initial investment in the company upon incorporation. As such, the company must rely on other sources of finance until it is able to return a profit, or at least cover its own costs.

[13] Companies Act 2006, s11(3).
[14] Companies House, *Companies Register Activities 2017 to 2018* (28 June 2018).
[15] Some non-profit organisations, such as service companies formed by leaseholders of a communal residence, may still adopt a share company format. The share company format can be useful where the obligations of each member are not the same, as specific obligations can be attached to particular shares. Furthermore, as the par value of shares may be set very low (often at £1 or even a penny), the initial outlay by the leaseholders is small, so the financial objection to share company membership disappears.

Community interest companies

Part 2 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 introduced a new type of company, known as a community interest company ('CIC'), designed specifically for social enterprise and businesses.[16] The CIC is governed by the CA 2006, subject to the provisions of the 2004 Act.

A CIC may be either a company limited by shares or a company limited by guarantee.[17] However, whilst the underlying format of the CIC is the familiar share or guarantee company, the CIC has additional idiosyncratic features. First, to be a CIC, the company must be formed for the pursuit of community interests and, accordingly, every CIC must meet a community interest test.[18] The legislation does not define 'community interest', except to say that 'a company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community'.[19]

Second, CICs are subject to asset lock provisions, found in sections 30 to 32 of the 2004 Act, which ensure that the assets of a CIC (including any profit or surplus) are used for the benefit of the community. In particular, section 30(1) provides that CICs must not distribute assets to members unless regulations provide for those distributions.

Third, a Regulator of Community Interest Companies is responsible for overseeing the activities of CICs.[20] The Regulator spends much of its time determining whether a company is eligible for CIC status, as well as ensuring that the asset lock provisions and restrictions on the distributions of profits are observed. The Regulator is expected to take a 'light touch' approach to regulation to develop the CIC 'brand' and, as such, should primarily adopt a guidance and assistance role.[21]

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[16] CICs are unable to benefit from charitable status, notwithstanding their emphasis on benefitting the community, see Companies (Audit, Investigations and Community Enterprise) Act 2004, s26(3).
[17] Companies (Audit, Investigations and Community Enterprise) Act 2004, s26(2); Companies Act 2006, s6(1).
[18] Companies (Audit, Investigations and Community Enterprise) Act 2004, s35.
[19] Companies (Audit, Investigations and Community Enterprise) Act 2004, s35(2).
[20] Companies (Audit, Investigations and Community Enterprise) Act 2004, s27 and ss41-51.
[21] Department for Business, Energy and Industrial Strategy: Office of the Regulator of Community Interest Companies, *Information and Guidance Notes* (May 2016) chapter 11.

The CIC company format is growing in popularity, with a 9% growth in the number of CICs in 2017/2018.[22] The Regulator sends out regular updates on the number of CICs registered via social media outlets, with a recent update detailing that 19,020 CICs are on the public register as of 14 April 2020.[23] At first glance, the idiosyncrasies of the CIC indicate that it has potential for the purposes of securing a mutual self-interest common. Therefore, the CIC should not be overlooked, or conflated with the underlying share and guarantee companies upon which it is based.

Commonhold

Commonhold is a form of freehold land ownership introduced by the Commonhold and Leasehold Reform Act 2002. The Law Commission describes commonhold as

> a new way to own freehold property. Commonhold enables a person to own the freehold of a 'unit' (such as a flat) within a building or development and also become a member of a company which owns and manages the shared areas.[24]

The company formed to own and manage the shared areas (or 'common parts',[25] as they are termed in the legislation) is known as a commonhold association. The Law Commission defines common parts as

> Any areas of the commonhold which do not form part of a unit. Common parts will generally include communal areas shared between unit owners (such as garden and grounds, entrance halls, landings and staircases) and structural parts of the building, such as external walls and the roof. Additionally, the common parts will include any pipes, cables and other installations, except for those situated within a unit and which serve only that unit.[26]

Therefore, where the circumstances and context permit, a community may form a commonhold association to own and manage its shared amenity spaces. Accordingly, at first glance it appears that the commonhold structure has some potential to secure and give event to a mutual self-interest common.

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[22] Regulator of Community Interest Companies, *Annual Report 2017-2018* (2018) 3.
[23] https://twitter.com/CICRegulator/status/1249973802450268166 (last accessed 19 April 2020).
[24] Law Commission, *Reinvigorating Commonhold: The Alternative to Leasehold Ownership* (Consultation Paper 241, 10 December 2018) [1.1].
[25] Commonhold and Leasehold Reform Act 2002, s1 and s25.
[26] Law Commission n24 1.

Commonhold associations

A commonhold association is a guarantee company.[27] As such, commonhold associations are governed by the CA 2006, subject to any specific requirements and governing provisions of the Commonhold and Leasehold Reform Act 2002. Of those provisions, it is of particular note that only unit holders are entitled to be members of a commonhold association.[28]

A commonhold association, being a company limited by guarantee, is governed by its memorandum and articles of association. However, unlike other company structures, the commonhold association must also adopt a community statement. The community statement makes provision for the rights and duties of the commonhold association and the unit holders, and must be in the prescribed form.[29] Furthermore, schedule 3 of the Commonhold Regulations 2004 provides for the basic content of a community statement, and may permit, require or prohibit the inclusion of specific provisions or provisions of a specified kind for a specified purpose or about a specified matter.[30]

The utility of commonhold

Clarke briefly considered the commonhold in her 2006 study, and concluded that it was unlikely to 'transcend the limitations of the standard form of company as a communal resource-holding vehicle, and in some respects is even less satisfactory.'[31] She reaches that conclusion for five reasons.[32]

First, the commonhold association is just a company limited by guarantee, albeit with a prescribed form of constitution. Second, there is a danger that commonholds will be too heterogenous to operative effectively. Third, the provisions governing the rights and duties of the unit owners appear to be over prescriptive and mandatory, limiting the prospect of idiosyncratic regulation being developed by members of the

[27] Commonhold and Leasehold Reform Act 2002, s34(1).
[28] Commonhold and Leasehold Reform Act 2002, schedule 3 para 7 and para 10.
[29] Commonhold and Leasehold Reform Act 2002, s31(2) and s31(2).
[30] Commonhold and Leasehold Reform Act 2002, s32(2).
[31] Clarke n1 352.
[32] Clarke n1 353-355.

commonhold association. Fourth, unit ownership cannot not be forfeited, irrespective of the severity of a unit holder's breach of the rules of the association.[33] Finally, Clarke notes that section 35(1) prohibits the directors of a commonhold association taking into account interests broader than those of the immediate members. However, in light of the understanding of the mutual self-interest characteristic used in this project, it is suggested that Clarke's argument on this final point is misconceived.

The Law Commission have recently consulted on possible reform to the commonhold scheme.[34] From that consultation paper, three observations important to this project emerge. First, fewer than 20 commonholds have been established since the Commonhold and Leasehold Reform Act 2002 came into force on 27 September 2004.[35] As such, the commonhold scheme's effect on communal resource management has been minimal, at best. Second, in light of the failure of the commonhold legislation, the Law Commission intends to propose reform of the law relating to commonhold in spring 2020, and it is highly likely that the statutory scheme currently in force will be heavily modified. Third, the commonhold scheme is intended to be an alternative to leasehold ownership of flats by allowing for their freehold ownership, and its provisions for the management of shared communal spaces was designed with that context in mind.

For the foregoing reasons, and as the commonhold is, at present, simply a guarantee company, it is not necessary to assess the commonhold itself as a stand-alone institution for the securing of a mutual self-interest common. The commonhold's success or failure in securing a mutual self-interest common will depend on the suitability of the underlying corporate form, a full analysis of which will be provided throughout this chapter. The few instances in which the analysis of the commonhold departs from that of the guarantee company will be noted as they arise throughout this chapter.

[33] Commonhold and Leasehold Reform Act 2002, s31(8).
[34] Law Commission n24.
[35] Ibid [1.4].

Community land trusts

Finally, the community land trust ('CLT') may be used to secure a mutual self-interest common. In short, a CLT is 'a local community-controlled organisation set up to own and manage land and other assets in perpetuity for the benefit of the community.'[36]

The National CLT Network describes CLTs as

> non-profit, community-based organisations run by volunteers to develop housing, workspaces or other assets that meet the needs of the community and are owned and controlled by the community.[37]

To that end, the majority of CLTs currently in existence are concerned with the delivery of affordable housing schemes.[38]

Section 79(2) of the Housing and Regeneration Act 2008 defines the CLT as a corporate body that satisfies two conditions. Those conditions are set out in sections 79(4) and 79(5) of the 2008 Act

> (4) Condition 1 is that the body is established for the express purpose of furthering the social, economic, and environmental interests of a local community by acquiring and managing land and other assets in order –
>
> (a) to provide a benefit to the local community, and
>
> (b) to ensure the assets are not sold or developed except in a manner which the trust's members think benefits the local community.
>
> (5) Condition 2 is that the body is established under arrangements which are expressly designed to ensure that –
>
> (a) any profits from its activities will be used to benefit the local community (otherwise than being paid directly to members),
>
> (b) individuals who live or work in the specified area have the opportunity to become members of the trust (whether or not others can also become members), and

[36] C Handy, 'Community Land Trusts' (2010) 13(5) *Journal of Housing Law* 83.
[37] National CLT Network, *The Community Land Trust Handbook* (December 2012) para 1.2.
[38] Department for Communities and Local Government, *Community Land Trusts: A Consultation* (October 2008) 5.

(c) the members of the trust control it.

The statute makes clear that the CLT relies on an underlying corporate form. To that end, the Department for Communities and Local Government observed that the majority of CLTs in existence are constituted as either guarantee companies (some with charitable status) or community benefit societies (see chapter five).[39]

As such, the CLT's success or failure in securing a mutual self-interest common will depend on the suitability of the underlying corporate form. Therefore, it is not necessary to assess the CLT itself as a stand-alone institution for the securing of a mutual self-interest common.

The use of the corporate form

The corporate form lends itself to securing a mutual self-interest common in instances in which the community wishes to acquire a resource from a third party who is not a community member. For example, where the residents of a road make use of a green space located within the road, but which is owned by someone who does not also live there, such as the developer who constructed the housing scheme, the community may seek to acquire the land to ensure its continued ability to access and use the land. The community's use of the land may be under threat all the time the title to it is not held by the community itself, or at least a member of the community who is sympathetic and supportive of the community's use. For example, the owner may choose to use the land in such a way that is incompatible with the community's use, such as by building another housing unit, and would be entitled to do so subject to planning controls and any other legal rights binding the land. To remove that risk, the community may seek to acquire the legal title from the third party, and the most obvious mechanism and ownership through which this can be done is the corporate form.

[39] Ibid 9.

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

Companies are legal persons and can hold the legal title to land. Therefore, unlike the trust, a company does not burden a land title with the interest of a community. Instead, a company allows a community to hold the title to the communal resource, provided the membership of the community is reflected in the membership of the company.

As a general rule, the assets of a company are freely alienable. Upon alienation, the communal rights over the assets are defeated, although new rights will arise over the goods or funds for which they are exchanged. However, obtaining an interest in substitute assets is not enough to exhibit the first limb of the inalienability characteristic; allowing substitutions fails to acknowledge the value that a community attributes to a specific resource, and its relationship with it. Essentially, the objection is the same as that offered in chapter two in the context of the trust and overreaching: viewing substitute assets as equal to the communal resource treats the resource simply as wealth, rather than valuing it for its intrinsic qualities as a thing.

Two solutions exist that may prevent alienations that defeat communal rights: statutory and non-statutory asset locks. Asset locks prevent or restrict alienations, rather than preserving members' rights on the occurrence of alienations. Therefore, it is questionable whether these are desirable methods through which the problem should be addressed, as it was argued in the introduction to this project that retaining alienation powers could in fact be beneficial for the mutual self-interest common.[40] It may instead be more desirable to burden the land with the community's interest, with a view to that interest surviving transfers of title.

[40] 'Introduction' pp23-24.

i. Statutory asset locks

The CIC is the only company format to benefit from a compulsory statutory asset lock. The relevant provisions are found in sections 30 to 32 of the Companies (Audit, Investigations and Community Enterprise) Act 2004. In particular, section 30(1) provides that a CIC must not distribute assets to its members unless regulations provide for distributions, with section 30(2) providing that, even if distributions are authorised, regulations may also impose limits on the extent to which a CIC may distribute assets to its members. Furthermore, section 30(3) provides that regulations may impose limits on the payment of interest on debentures issued by, or debts of, a CIC. In addition, section 31(1) states that regulations may make provision for the distribution of any assets left over after the satisfaction of a CIC's debts on its winding up. Lastly, sections 32(3)(a) and 32(4)(a)-(b) provide that a CIC's articles of association must include provisions concerning the transfer and distribution of a CIC's assets and payment of interest on debentures. To that end, the Community Interest Company Regulations 2005 contain model articles of association[41] for CICs which, in schedules 1-3, prescribe the limited circumstances in which, and to whom, assets may be transferred. A CIC is free to adopt more stringent provisions than those contained in the model articles, but may not adopt anything more lenient.

The substantive asset lock provisions in the 2005 Regulations are in paragraph 1 of schedules 1-3. Schedule 1 relates to CICs that are set up as guarantee companies, schedule 2 relates to CICs that are share companies or guarantee companies with share capital, and schedule 3 contains alternative provisions for CICs that are share companies or guarantee companies with share capital and which intend to return a profit on investor shares. A CIC subject to the asset lock provisions of schedules 1 or 2 may only its transfer assets in three circumstances. First, it may transfer assets for full consideration so that the CIC retains the value of the assets.[42] Second, it may transfer assets to either an asset-locked body specified in the articles of association, or an unspecified asset-locked body with the permission of the Regulator.[43] Third, it may

[41] The role of model articles will be considered further in the context of idiosyncratic regulation.
[42] Community Interest Company Regulations 2005, schedule 1 para 1(1); Community Interest Company Regulations 2005, schedule 2 para 1(1).
[43] Community Interest Company Regulations 2005, schedule 1 para 1(2)(a); Community Interest Company Regulations 2005, schedule 2 para 1(2)(a).

make transfers of assets that are for the benefit of the community, other than by way of transfers to asset-locked bodies.[44] Schedule 3 permits distributions of CIC assets in a wider set of circumstances than schedules 1 and 2. In particular, distributions may be made by way of payment of dividends[45] (subject to a dividend cap, to be discussed shortly), and on the winding of up a CIC.[46] The provisions concerned with how assets should be distributed on the winding up of a CIC can be found in regulation 23 of the 2005 Regulations.

The asset lock provisions are designed to ensure that the assets of the CIC, including any profits or surplus generated, are used for the benefit of the community.[47] Importantly, as a statutory requirement of a CIC, the asset lock is permanent, and cannot be undone. However, the basic mandatory provisions found in schedules 1-3 of the 2005 Regulations are unlikely to be sufficient to enable the CIC to exhibit the first limb of the inalienability characteristic, for three reasons.

First, permitting transfers that are made for full consideration on the basis that the community retains the market value of the asset does not align with the values of a mutual self-interest common; it assumes that the community's interest is in the value of the asset rather than the asset itself, and again values the assets as wealth rather than for their intrinsic value as things. The asset lock provisions should instead reflect that the community's interest is in the preservation, retention and use of the asset, and that allowing its alienation merely because full consideration is paid undermines that interest. In some instances, a community may wish to substitute its resources, as the needs of a community or the utility of the resource may change. However, simply allowing transfers that are for full consideration affords too much flexibility to the directors of the CIC, and enables them to transfer the communal resource irrespective of whether those changes in need have occurred. The asset lock provisions would better comply with the first limb of the inalienability characteristic if the directors of a CIC were first required to consult with, and obtain the approval of, community members

[44] Community Interest Company Regulations 2005, schedule 1 para 1(2)(b); Community Interest Company Regulations 2005, schedule 2 para 1(2)(b).
[45] Community Interest Company Regulations 2005, schedule 3 para 1(2)(c). Payment of dividends are subject to the dividend cap.
[46] Community Interest Company Regulations 2005, schedule 3 para 1(2)(d).
[47] Department for Business, Energy and Industrial Strategy: Office of the Regulator of Community Interest Companies n21 chapter 6.1.

before any transfers are made. That way, the resource would be inalienable, unless there were exceptional circumstances that required its substitution. A CIC could adopt this more stringent asset lock in its articles of association. However, the only guaranteed asset lock is that contained in the 2005 Regulations.

Second, permitting transfers to other asset-locked bodies also fails to acknowledge and preserve the community's connection to the resource. 'Asset-locked body' is defined in the regulations as 'a community interest company, charity or Scottish charity' or 'a body established outside of the United Kingdom that is equivalent to any of those persons'.[48] Notably, the definition does not require that the transferee asset-locked body should be of the same nature or have the same objectives as the transferor CIC. As such, the resource may be alienated and put to a different use by a CIC or charity whose objectives, aims or desires do not align with those of the community. This danger can be mitigated by stipulating the asset-locked bodies to which transfers are permitted in the CIC's articles of association, or by the Regulator being selective in the transfers that it approves. Nonetheless, even mitigating the effect of the regulations in this manner will not ensure that the community interest is protected; unless the membership of the transferor CIC is mirrored in the membership of the transferee CIC, the community will no longer 'own' the communal resource, and will have no control or enforceable rights over it.

In addition, permitting transfers of CIC assets to charities on the basis that they are asset-locked bodies does not accord with the limited-access nature of the mutual self-interest common. As discussed in chapter two, charities must meet a public benefit requirement, and are open-access arrangements. A charity cannot preserve and manage property for the benefit of one community at the expense of others, and any attempt to restrict a charity to a limited-access arrangement will cause it to lose its charitable status. Therefore, if CIC assets are transferred to a charity, the community will have no greater claim to the property than the general public.

[48] Community Interest Company Regulations 2005, schedule 1 para 4(a); Community Interest Company Regulations 2005, schedule 2 para 4(a); Community Interest Company Regulations 2005, schedule 3 para 4(a).

Third, the mandatory asset-lock provisions allow transfers of assets that are for the benefit of the community. However, the regulations do not define or offer guidance as to how 'benefit' should be interpreted. It is possible that, whilst a community may wish to retain an asset over which it has established a mutual self-interest common, objectively the best course of action is to transfer or substitute that asset. For example, a community may use a parcel of land for the purposes of recreation, and civic life may have been conducted on it for many years. However, the community may have out-grown the land and require a larger amenity space. Objectively, it would be for the benefit of the community to transfer the title to the pre-existing land and use the realised value to acquire a substitute. However, the community attachment to the land may be so great that the community, notwithstanding the objective benefit, does not desire the alienation and substitution of the land. In the absence of the regulations providing that 'community benefit' should be determined according to the community's subjective understanding of what would be of benefit, transfers of assets may occur that undermine the mutual self-interest common, and which do not appreciate the community's relationship with the land.

Finally, a dividend cap works alongside the statutory asset lock to preserve a CIC's assets. Dividends may only be paid if a CIC has adopted the model articles in schedule 3 of the 2005 Regulations, or if express provision has been made for the payment of dividends in bespoke or amended articles of association. Any dividends paid are subject to a cap, found in regulations 17 to 22 of the 2005 Regulations, which aim to '[strike] a balance between encouraging people to invest in CICs and the principle that the assets and profits of a CIC should be devoted to the benefit of the community.'[49] The exact methodology and working of the dividend cap is difficult to digest but, in short, it ensures that 65% of a CICs profit is reinvested back into the CIC or used to benefit the community that it serves.[50] On a strict interpretation, the ability to pay any dividends and dispose of CIC profits is incompatible with the inalienability characteristic. However, the inquiry in this project should not take place in an academic vacuum. Real world considerations and practicalities must be considered and the reality is that, in instances where a CIC requires financial investment to aid the management and

[49] Department for Business, Energy and Industrial Strategy: Office of the Regulator of Community Interest Companies n21 chapter 6.3.
[50] Ibid.

maintenance of a communal resource, investors would probably only invest if that investment delivered a return. As such, it may need to be accepted that, in order for the CIC to be used as a means of securing a mutual self-interest common, the dividend cap represents the best way of balancing the institutional shortfalls of the CIC with the required characteristics.

ii. Non-statutory asset locks

All companies may adopt a non-statutory asset lock in their articles of association, and these are particularly popular with guarantee companies that operate on a not-for-profit basis. A non-statutory asset lock may mirror its statutory counterpart, or may lock in assets through other means, such as by requiring the consent of all members before any transfer of assets. Being non-statutory, there is no standard form that the asset lock provisions must take, and no standard effect that they must have. Therefore, non-statutory asset locks may be less stringent than those with a statutory basis, and even less effective in securing the first limb of the inalienability characteristic.

Furthermore, a non-statutory asset lock is grounded in the constitution of the company, which can be amended.[51] The asset lock provisions may be entrenched to make any amendments difficult, but entrenchment cannot prevent the amendment of the articles altogether.[52] As such, non-statutory asset locks can be modified and removed, and cannot provide an absolute guarantee that the assets of the company will not be alienated.

Therefore, even if a company does adopt a non-statutory asset lock, which it is not bound to do, it is still possible that assets may be alienated, or that the provisions will only mirror the statutory provisions and protect the value of the assets. As such, whether a company adopting a non-statutory asset lock does in fact exhibit the second limb of the characteristic will depend on the terms of that asset lock, and whether it is subsequently modified.

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[51] Amendments to articles of association are considered in the discussion concerning idiosyncratic regulation. In short, amendments to the articles of association of a company are governed by the Companies Act 2006, s22(1) and require a special resolution.
[52] Companies Act 2006, s22(3) and 22(4).

iii. Asset locks and the rule against inalienability

Dawson considers whether the rule against inalienability could and should be applied beyond its traditional application to trusts.[53] In particular, he considers whether the rule is compatible with the asset lock provisions of the CIC.

In short, Dawson's view is that the rule against inalienability could, and should, be extended and applied to control asset locks in companies. He relies on a statement made by Jessel MR in *Russell v Wakefield Waterworks Co*,[54] in which his Lordship held that money held by a company to be used for special purposes was in essence a trust, and that any misappropriation of the funds would generate liability to account as a constructive trustee. Dawson applies Jessel MR's reasoning to the CIC to facilitate the application of the inalienability rule and challenge the validity of asset locks. Furthermore, Dawson also argues that, even if the inalienability rules only apply to a trust, and the CIC cannot be conceptualised as a trust as it owns its assets beneficially, there may still be a 'quasi-trust' to which the inalienability rules would apply.[55] Finally, Dawson's view is that treating a company in the same way as a trust or quasi-trust 'would give flexibility and allow the court to balance the competing interests by reference to the facts, including the social conditions, as they existed at the time'.[56] Therefore, the inalienability rules should apply to corporate property to help achieve a desirable distribution of property in society, by either striking down or allowing perpetual property holding by corporate forms.

However, Dawson concedes that company assets would historically have been subject to the rules of mortmain (the forerunner to the inalienability rules), and that excluding the rules of mortmain became the norm. Furthermore, Dawson notes that there have been no subsequent attempts to strike down a company's holding of assets on the basis of the inalienability rules. The settled understanding is that corporate property holding is not a trust relationship and, as such, the inalienability rules neither apply nor are they

[53] I Dawson, 'The Rule Against Inalienability – a Rule Without a Purpose?' (2006) 26(3) *Legal Studies* 414.
[54] (1875) LR 20 Eq 474, 479.
[55] Dawson n53 419.
[56] Ibid 435.

offended; the company is the absolute and beneficial owner of the property and can transfer it, subject to the rules set out in its constitution.[57] As such, the conclusion that must be drawn from Dawson's research is that, whilst there may be reasonable arguments to the contrary, asset locks are in fact compatible with, and do not offend, the rule against inalienability.

Severance and alienation of a discrete share

A company owns its property, not the members. '[T]he corporator even if he holds all the shares is not the corporation… neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.'[58] As such, members of a company hold only an interest in the company, not its assets; the interest is proprietary and conferred by the articles of association.[59] To that end, the second limb of the inalienability characteristic may be exhibited, as no member of the community can, as a member of the company, sever and transfer a discrete share of the communal resource.

Furthermore, Davies and Worthington observe that, as the members of a company do not have an interest in its property, they do not share any property in common. Instead, the most that members share are 'certain rights in respect of dividends, return of capital on a winding up, voting and the like.'[60] Therefore, it could be argued that the company is just an example of the class action concept of collective rights[61] as, with regard to the communal property, the members are little more than a group of similarly situated individuals with discrete interests that mirror each other.

Nonetheless, it is possible, in some circumstances, for a member to transfer their interest in the company, and the transferee may be a third party from outside the community. A transfer will entitle the transferee to any distributions of assets made by the company, subject to any asset lock provisions. Therefore, a member transferring

[57] Ibid.
[58] *Macaura v Northern Assurance Co Ltd* [1925] AC 619, 633 (Lord Wrenbury).
[59] *Gower Principles of Modern Company Law* n7 23-2.
[60] Ibid 23-1.
[61] McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218. See 'Introduction' pp20-21.

their share is tantamount to the severance and transfer of a discrete interest in the communal property, even if the members do not strictly have an interest in the assets of the company. Each company has different rules concerning the transfer of members' interests, and it is necessary to consider each in turn.

i. Companies limited by shares

Members have a discrete and quantifiable share in the company. These shares constitute an item of property that is freely transferrable, subject to contrary provision in the articles of association.[62] Upon a transfer of shares, the transferee steps into the shoes of the transferor; the transferor is no longer entitled to derive a benefit from the shares, or liable to contribute to the assets of the company on a winding up, subject to the provisions of the Insolvency Act 1986.[63] The fact of each member having a transferable share in the company, and therefore a transferrable entitlement to a discrete share of the benefit derived from the company assets, is problematic for the exhibition of the second limb of the inalienability characteristic. However, the impact of share transfers on the exhibition of the second limb of the characteristic can be mitigated in two ways: rights of pre-emption and directors' powers to refuse to register transfers.

First, a company's articles of association may restrict the transfer of shares by conferring rights of pre-emption on the company members.[64] Pursuant to such rights, a transferring shareholder must first offer their share to existing shareholders, and may only transfer to a third party if the pre-emption right is not exercised. Pre-emption rights aid the exhibition of the inalienability characteristic as they limit the instances in which shares may be alienated outside of the community, at least where the company and community membership are symmetrical. However, if the existing shareholders do not opt to take the shares from the transferor, the shares may go to a third party. Consequently, rights of pre-emption are not guaranteed to ensure that company shares remain within the relevant community. In addition, rights of pre-emption do not address

[62] Companies Act 2006, s544.
[63] Insolvency Act 1986, s74 and s76.
[64] The statutory rights of pre-emption contained in the Companies Act 2006, s561 apply to issues of news shares. As such, rights of pre-emption on the occasion of share transfers must be incorporated within the articles of association.

or remedy the fact that each shareholder has a discrete interest in the company that can, in principle, be transferred.

Second, the articles of association may confer upon directors the power to refuse to register transfers.[65] A transferee only becomes a member of the company once their name is entered onto the register of members.[66] Once a transfer of shares is lodged with the company, the company must either register the transfer or give the transferee notice of refusal to register, with reasons for that refusal.[67] Directors could, in an attempt to keep the shareholding within the community, exercise their powers and refuse transfers of shares to those outside of the community. However, directors' powers to refuse transfers are not guaranteed to ensure that the benefit of shares remain within the community. If a company refuses to register a transfer, the transferee acquires the equitable title to the shares, and becomes an equitable shareholder. Consequently, the transferor, who retains the legal title and remains on the register, will have to account to the transferee for any dividends. Furthermore, company directors are subject to fiduciary duties when exercising their powers and discretion. If refusing a transfer is not in the best interests of the company, a director is duty bound to accept the transfer, and would be liable for a breach of duty if they refused it. In any event, as with rights of pre-emption, eliminating transfers to non-community members does not address the wider problem of allowing each member to hold a discrete share in the company.

ii. Companies limited by guarantee

Members of a guarantee company do not hold shares in the company. Instead, a member of a guarantee company commits themselves to the company by guaranteeing to pay an amount towards the debts of the company on winding up. Whether a member can be considered as having a discrete share in the company turns on whether the articles of association permit distributions of profits to members. If the articles permit distributions, each member is treated as having a share in the company.[68] If, on the other hand, the articles do not permit distributions, members' rights are limited to rights

[65] See article 26 of the model articles of association.
[66] Companies Act 2006, s112.
[67] Companies Act 2006, s771(1).
[68] *Re National Farmers' Union Development Trust Ltd* [1973] 1 All ER 135.

to vote. Whilst the right to vote may allow members to control the company and its property, they are unable to appropriate the property to themselves. Therefore, in order for a guarantee company to exhibit the second limb of the inalienability characteristic, the articles must not permit distributions of surplus to its members.

If a guarantee company does permit distributions to members, giving each member a 'share' in the company, transfers of those shares may still be prevented. In principle, members are able to transfer their membership to a third party; membership rights are contractual rights and are assignable according to the general law of contract.[69] However, it is commonplace for the articles of a guarantee company to provide that membership is non-transferrable and ceases on the death of a member, although the effectiveness of any such provision is subject to the usual rules of construction.[70] Mullen and Lewison argue that, if the articles prevent the transferring of membership, the members' interest in the company cannot be considered proprietary.[71] This argument is presumably made by drawing on the definition of property rights proffered by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth*.[72] However, it is readily accepted that rights that are not freely alienable may in fact be proprietary.[73] Therefore, the transferability of membership, or lack thereof, will not prevent a member from either holding a share in the company, or that share being classified as proprietary.

In short, where the articles permit distributions to its members, the enjoyment of a discrete share in the company cannot be prevented, although transfers of those shares may be restricted. Nonetheless, the enjoyment of a discrete share precludes the exhibition of the second limb of the inalienability characteristic.

[69] Often, a member will not seek to transfer their membership but will instead cease to be a member through either retirement or automatic cessation (such as death, bankruptcy or by ceasing to be a member of an organisation upon which company membership depends).
[70] M Mullen and J Lewison, *Companies Limited by Guarantee* (Jordan Publishing Ltd 4ed 2014) 81.
[71] Ibid 87.
[72] [1965] AC 1175.
[73] Examples of interest that are not freely assignable, but which are still considered proprietary, include the easement and the non-assignable lease.

iii. Community interest companies

In addition to the transfer powers outline above, section 49 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 confers upon the Regulator the power to both order the transfer of shares and extinguish membership of a guarantee company where that company is a CIC.

Whilst the transfer of shares would ordinarily be problematic for the second limb of the inalienability characteristic, the power conferred upon the Regulator may in fact preserve the communal asset. The Regulator's power is exercisable only if it appears to the Regulator that the CIC in question is an excluded company that does not meet the community benefit test.[74] The power is intended to ensure that community assets remain with the community; it allows the Regulator to arrange for the control of the CIC to change hands, with a view to the CIC ceasing to be an excluded company and meeting the community benefit test.[75] By ordering transfers of CIC shares, the Regulator can ensure that the company's resources are in fact preserved, and applied to the community benefit.

Conclusion

Companies do not exhibit either limb of the inalienability characteristic. As to the first limb, the assets of a company are freely alienable, and are not burdened with the interests and entitlements of the community when alienated. Asset locks may be adopted to prevent alienations that defeat communal rights, but only CICs benefit from statutory asset locks, with other companies forced to rely on non-statutory means. Furthermore, statutory asset locks view the communal resource as wealth, as opposed to a thing with its own intrinsic value, and allow alienations that deliver a financial benefit. In addition, non-statutory asset locks can be amended or removed from the articles, and cannot guarantee inalienability. Consequently, the first limb of the characteristic is not exhibited.

[74] Companies (Audit, Investigations and Community Enterprise) Act 2004, s41(4). 'Excluded companies' are defined in section 35(6) of the 2004 Act and the Community Interest Company Regulations 2005, regulation 6, as being companies that are political parties, political campaigning organisations, or a subsidiary of either a political party or campaigning organisation.
[75] Companies (Audit, Investigations and Community Enterprise) Act 2004, explanatory note [253].

As to the second limb, members of share companies, and occasionally also members of guarantee companies, hold a discrete share in the company, and consequently an entitlement to a discrete benefit or share of the company property. For the most part, those interests are freely transferrable, subject only to some limited restrictions. Consequently, the community members have a severable and transferrable share in the communal resource, and the second limb of the inalienability characteristic is not exhibited.

Perpetuity and intergenerational equality

As an artificial person, a company is not susceptible to the shortcomings of a human with a natural life. A company has 'no soul to be saved or body to be kicked',[76] cannot suffer from incapacity and, most importantly in the context of a mutual self-interest common, does not, ordinarily, have defined life span. A company's articles of association may fix the period of a company's duration, although it is rare for them to do so. Furthermore, whilst section 84(1)(a) of the Insolvency Act 1986 makes provision for the winding up of a company upon the expiration of any fixed term, the termination of the company is not automatic, and it will continue to exist until the formal winding up procedure is completed. Therefore, whilst its members may come and go, companies endure,[77] and the communal resource is held perpetually as an asset of the company.

Consequently, the company appears to exhibit the perpetuity and intergenerational equality characteristic. The resource remains held by the community, even when membership of the community fluctuates. As such, future generations of members are able to enjoy the same entitlement to the resource as present members.

However, the perpetual existence of a company is not guaranteed. It is possible to terminate a company through several means, including by amalgamation, takeovers, transfer of engagements and winding up and dissolution. In cases other than winding

[76] *Stepney Corporation v Osofsky* [1937] 3 All ER 289, 291 (Greer LJ).
[77] The editors of *Gower Principles of Modern Company Law* n7 present the anecdote of a company whose entire membership was killed in a bomb attack in the Second World War. Despite the death of all the members, the company continued to exist and hold its assets by virtue of the corporate personality that it enjoyed independent of its members.

up and dissolution, the assets of the company remain subject to a scheme of perpetual succession, even if the identity of the company changes. Therefore, provided the 'new' company also operates with the objective of securing a mutual self-interest common, amalgamations, takeovers and transfers of engagements may not present a problem for the perpetuity and intergenerational equality characteristic.[78] However, the same cannot be said of winding up and dissolution.

Winding up and dissolution

Winding up a company brings the existence of the legal entity to an end. Once a company is wound up, its liabilities satisfied in so far as they can be, and any surplus assets distributed, the company is dissolved and its name removed from the register of companies. Alternatively, if a company has no remaining assets,[79] or has ceased trading and is no longer required, the directors can apply to have the company removed from the register pursuant to section 1003 of the CA 2006. Two forms of winding up exist: voluntary winding up, and winding up by the court. Voluntary winding up is further subdivided into two types: members' voluntary winding up and creditors' voluntary winding up. Members' voluntary winding up is only available if the company is solvent.

All forms of winding up are governed by the Insolvency Act 1986. Section 124(1) of the 1986 Act lists those who may petition the court to order a winding up, which includes the company itself, the members and the directors, with section 122 specifying the eight grounds on which a court may wind up a company. The court should not make a winding up order if it is of the opinion that there is another remedy available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.[80]

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[78] There are valid reasons why a company used to secure a mutual self-interest common may amalgamate, transfer its engagements or allow a takeover. For example, all three actions are ways of raising equity finance, which may be needed for investment in the communal resource for the benefit of the community. Alternatively, communities and resources may merge over time, and the legal institutions used to hold those resources may need to merge in order to reflect those changes and better manage the resources.

[79] Any assets that the company holds on dissolution are deemed to be bona vacantia, see the Companies Act 2006, s1012, therefore it is advisable that a company is divested of its assets before dissolution.

[80] Insolvency Act 1986, s125(2).

Irrespective of which method of winding up is used, the outcome is the same in that the company ceases to exist. Therefore, all forms of winding up undermine the company's exhibition of the perpetuity and intergenerational equality characteristic. Furthermore, winding up undermines the exhibition of the perpetuity and intergenerational equality characteristic not just because the legal entity is terminated, but also because the company's assets (the communal resource) are liquidated. A liquidator is appointed on the winding up of a company. The liquidator's role is to gather in all of the company's assets and distribute them to those entitled to them in order of priority.[81] Only if the claims of creditors are fully satisfied will the members of the company be entitled to receive any of the company's assets.[82] Consequently, the community are likely to lose the resource. As such, winding up prevents intergenerational equality of benefit, as future generations of community members are deprived of the opportunity to benefit from the resource.

The role of asset locks in the distribution of company assets should not be forgotten. Asset lock provisions can ensure that any surplus assets are not distributed amongst the members, but are instead diverted to similarly asset-locked bodies that serve the community. As such, asset locks may help promote intergenerational equality by ensuring that the resource remains available to future generations of community members, even if the company originally formed to secure those ends has ceased to exist. However, it should also be remembered that the asset lock only bites once the creditors and the costs of liquidation have been satisfied, and it is often the case that there are no surplus assets to be dealt with. In those circumstances, the intergenerational equality of benefit characteristic is not exhibited.

[81] Generally, secured creditors take priority, followed by the payment of costs incurred in the liquidation, preferential creditors, unsecured creditors, and finally the members are entitled to any surplus.

[82] Assets will be distributed proportionately amongst the shareholders according to the value of their shareholding. In a guarantee company, assets are generally distributed equally amongst members. See the Insolvency Act 1986, s107 and s154.

Conclusion

Companies do not exhibit the perpetuity and intergenerational equality characteristic. At first glance, corporate personality and perpetual succession appears to enable the exhibition of the characteristic, but this is undermined by the ability to terminate the company, most notably through winding up pursuant to the Insolvency Act 1986.

Exclusion of non-members

Only the members of a company are entitled to enjoy rights that are incident to membership. However, the exclusion characteristic requires more than this, and community members should enjoy the exclusory powers of an owner.

Exclusory powers are vested in the legal titleholder of the resource which, in the absence of legal personality, cannot be the community per se. Therefore, where a company is used to hold legal title to a communal resource, it is the company that enjoys the powers of exclusion over the land. In practice, and subject to the articles of association providing otherwise, it is the directors, acting in the name of the company, who hold the power to exclude those who do not enjoy a right to use the land.[83] As such, company members hold no direct power to exclude non-members of the community from the resource. However, as it is likely that the directors will also be members of the community, it is also likely that the directors will be inclined to exclude non-members of the community from the communal resource. Furthermore, company members have indirect powers to compel specific decisions, such as the exclusion of third parties, to be made. To that end, powers of particular use are actions against directors for breach of duty, derivative actions and actions for unfair prejudice.

Directors' duties

Directors owe to the company a variety of common law, equitable and statutory duties. The majority of the duties owed by directors are codified in the CA 2006, which

[83] It is anticipated that day-to-day decisions, such as the exclusion of trespassers, would be delegated to the directors, as opposed to requiring a members' vote.

replaces the old common law and equitable principles,[84] although the statutory duties should be interpreted and applied in a way that is consistent with the common law rules and equitable principles that they replace.[85] Importantly, these duties are owed to the company,[86] as opposed to the members of the company and, as such, can only be enforced by those who are able to act as or on behalf of the company.[87] The statutory duties owed by directors are: duties to act within their powers,[88] to promote the success of the company,[89] to exercise independent judgment,[90] to exercise reasonable care, skill and diligence,[91] to avoid conflicts of interest,[92] not to accept benefits from third parties,[93] and to declare any interest in proposed transactions or arrangements.[94]

If directors decline to prevent non-members of the community using the land, or decline eject those who are doing so, and that decision amounts to a breach of duty, directors may incur liability. For example, a director's decision not to exclude or eject a third party from the resource may amount to a breach of duty to promote the success of the company, especially if the purpose of the company is to secure the resource for the exclusive use of the community.[95] Similarly, a director failing to exclude third parties from the resource may amount to a failure to exercise reasonable care in the management of the resource. The threat of the statutory duties being enforced, and directors incurring liability, may act as an indirect exclusory power, as it may be used to compel directors to take the decision to exclude third parties.

However, there are two inherent weaknesses in using the enforcement of directors' duties to compel their decision-making. First, as noted above, the duties are owed to the company and not the members per se. Therefore, unless a member is also a director,

[84] Companies Act 2006, s170(3).
[85] Companies Act 2006, s170(4).
[86] Companies Act 2006, s170(1).
[87] The statute does not preclude members enforcing other duties against directors that do not arise out of their directorship. For example, where a fiduciary relationship arises between a director and a member, the member would be entitled to enforce fiduciary duties.
[88] Companies Act 2006, s171.
[89] Companies Act 2006, s172.
[90] Companies Act 2006, s173.
[91] Companies Act 2006, s174.
[92] Companies Act 2006, s175.
[93] Companies Act 2006, s176.
[94] Companies Act 2006, s177.
[95] The duty contained in section 172 is considered in the context of the mutual self-interest characteristic.

they are unable to enforce the statutory duties (subject to the rules on derivative actions, considered below). Nonetheless, if the members are unhappy with the director and their decision-making, they could seek to have them removed from office pursuant to section 168 of the CA 2006, which may in itself be incentive enough for directors to comply with members' desires to exclude third parties. Second, the failure to exclude non-members of the community from the resource must be a breach of duty for the threat of enforcement to have any compelling effect on directors' decision-making. If the failure to exclude is not a breach of duty, there is no risk of incurring liability, and therefore no incentive for directors to exercise their exclusory powers on behalf of the company.

Derivative actions

If the failure to exclude non-members of the community does amount to a breach of duty, and those entitled to enforce the duty do not take action,[96] members may initiate proceedings through a derivative action. Derivative actions, provided for in sections 260 to 264 of the CA 2006, are proceedings issued by a member of a company, in respect of a cause of action vested in the company, seeking relief on its behalf.

Members may view derivative actions as an unattractive method by which to indirectly force directors to exercise their exclusion powers. Derivative actions require the permission of the court. When deciding whether to grant permission, the court shows deference to the directors and will only allow the claim if a hypothetical director would need to commence the omitted action in order to comply with their duty to promote the success of the company.[97] As such, the threat of a derivative action only has bite if the failure to exclude is in fact a breach of duty. Furthermore, the statute is drafted in such a way that permission must be refused if there is in fact no breach of duty or if a hypothetical director would not need to commence proceedings. Even if those two hurdles are met, sections 263(3) and 263(4) contain matters to which the court may have regard when determining applications, and the court may decline to grant

[96] There is a risk that directors of a company will fall in line behind each other and not pursue breaches of duty. Similarly, directors in breach of duty may use their voting and management powers to frustrate actions against them.
[97] Companies Act 2006, s263(2)(a).

permission to bring proceedings pursuant to those considerations. Notably, pursuant to section 263(4) the court should have particular regard to views of company members who have no personal interest, direct or indirect, in the matter.

Furthermore, members may be disinclined to bring a derivative claim as, in doing so, they run the risk of having to pay both their own costs and the costs of the other parties.[98]

Unfair prejudice

Finally, members who are unhappy with the conduct of directors may petition for unfair prejudice, pursuant to sections 994 to 996 of the CA 2006. As the action suggests, such petitions are made when a member has suffered prejudice, and that prejudice is unfair (but not necessarily unlawful). Often, the unfair prejudice relates to a diminished value of shares, although other examples include exclusion from management (particularly where the company in fact a quasi-partnership), failure to provide information, breaches undermining trust and confidence and mismanagement. Therefore, members may petition for unfair prejudice on the grounds of mismanagement if the communal resource is not protected from use by non-members of the community, especially where the purpose of the company is to make the resource available for the use of the community only.

As with derivative actions, petitioning members must meet their own costs, and maybe those of the respondent, which may discourage them from petitioning for unfair prejudice. Furthermore, the remedies for unfair prejudice are generally wider than those awarded in actions for breach of duty against a director (whether brought by the company or as a derivative action). In particular, the ordinary remedy for unfair prejudice is a share purchase order.[99] However, there is a risk that, if a share purchase order is made, it will generate an inequality in shareholding between company

[98] The court may make an order that the company should indemnify the member for any costs incurred, see CPR PD19C para 2(2), although orders of this nature are usually only made if the claim has a reasonable chance of success and is for the benefit of the company.
[99] Companies Act 2006, s996(2)(e).

members, which is inconsistent with a mutual self-interest common.[100] As such, unfair prejudice petitions may also be unattractive to members as a way of compelling directors to act in a particular way.

Community interest companies

An additional layer of complexity exists where the company used to secure the mutual self-interest common is a CIC. A CIC must carry on its business in pursuit of a community benefit, as opposed to just for the benefit of its members. If the community that the CIC serves is wider than the mutual self-interest community, the directors may not be able to exclude non-members of the mutual self-interest community from accessing the communal resource.

Conclusion

Overall, the community itself does not enjoy the direct power to exclude non-members from the resource. However, in some circumstances, members of the company have indirect powers to exclude non-members of the community from the resource, although the exercise of those indirect powers may be ineffectual. The threat of liability for costs, as well as the need to engage with a technical and cumbersome legal process, may discourage members from enforcing against directors. Therefore, at best, the company only exhibits a weak and qualified form of the exclusion characteristic.

Mutual self-interest

A mutual self-interest common must be governed according to the interests of the community, and not the public interest. To that end, as the membership of a company used to secure a mutual self-interest common must reflect the membership of the community, to exhibit the mutual self-interest characteristic, a company must be governed exclusively in its members' interests.

[100] It is worth noting that a share purchase order will not be made if it would generate circumstances that are inconsistent with the articles of association and, where the company is used to secure a mutual self-interest common, the articles should be drafted to preclude inequality of shareholding amongst members.

It would be impractical, and in most cases impossible, for a company to conduct member votes on all issues of company management. Therefore, the day-to-day management of a company is usually delegated to directors and, in many instances, managing directors. Member votes are reserved for those matters requiring general or special resolutions, and for any other instances in which decision-making powers are not delegated to directors.

When exercising their decision-making powers, directors are subject to common law, equitable and statutory duties, as well as those contained in the articles of association. Of those duties, most pertinent to the mutual self-interest characteristic is a director's duty to promote the success of the company, found in section 172 of the CA 2006, which provides that

> (1) a director of a company must act in a way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
>
> (a) the likely consequences of any decisions in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationship with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.

Two issues arise with the duty contained in section 172. First, it seems that directors are required to balance members' interests against the interests of non-member stakeholders. Second, no guidance is given as to how 'success of the company' is to be interpreted.

As to the first issue, if directors are required to consider interests other than those of the company members, the mutual self-interest characteristic is not exhibited. As such,

the requirement that the interests of non-member stakeholders, listed at (a)-(f), should be considered jeopardises the exhibition of the characteristic. However, the drafting of section 172, and particularly the inclusion of 'in doing so', suggests that the obligation to have regard to the interests listed at (a)-(f) is subordinate to the discharging of the central duty to the company.[101] Furthermore, the editors of *Gower Principles of Modern Company Law* argue that the interests of non-shareholder groups do not have an independent value in the directors' decision-making, and are to be given consideration only to the extent that it is desirable to do so in order to promote the success of the company.[102] Therefore, it would be wrong to interpret section 172 as requiring directors to 'balance' interests when managing the company; the only consideration is the interests of the members, and other interests are only relevant in so far as they promote that. Therefore, there is a strong case to argue that a company does in fact exhibit the mutual self-interest characteristic.

The second issue is that the central duty contained in section 172 is to promote the 'success' of the company, without any guidance as to how the term should be interpreted. However, the absence of a strict definition of 'success' is in fact beneficial when using the company to secure a mutual self-interest common. Ordinarily, members of a company, and particularly share companies, would expect directors to use value enhancement as the touchstone when exercising their discretion. However, maximising the value of the company is not always a company's primary aim, especially where the company is, for example, a CIC or not-for-profit guarantee company. To that end, the use of 'success' instead of 'value' is notable, as 'success' is a wide term not constrained to the maximising of financial interests. Indeed, section 172(2) provides that

> Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

As such, members are able to define the purpose of the company as they wish (usually in the company's constitution), which the directors should pursue when promoting the

[101] R Hollington QC, *Shareholders' Rights* (Sweet and Maxwell 5ed 2007) 4-25, see also *Gower Principles of Modern Company Law* n7 16-38.
[102] Ibid 16-39.

success of the company. Consequently, if the constitution stated that the purpose of the company was to secure a mutual self-interest common for the benefit of the company members, the directors would be duty bound to pursue those purposes when promoting the success of the company. To that end, the company would exhibit the mutual self-interest characteristic.

Finally, with regard to the commonhold, it will be recalled that statute effectively prohibits the directors of a commonhold association taking into account interests broader than those of the immediate members.[103] Accordingly, guarantee companies that function as commonhold associations also exhibit the mutual self-interest characteristic.

On the whole, the company appears to exhibit the mutual self-interest characteristic. The prioritisation of the members' interest when directors exercise their decision-making powers, coupled with the members' ability to set the purposes of the company that the directors must pursue, ensure that the company and its assets are managed according to the interests of the members, to the exclusion of all others.

Community interest companies

The business of a CIC is conducted for the benefit of the 'community'. Therefore, the members' interest that should be pursued by the directors is the delivering of a benefit to the community. As such, a CIC is not managed in the interests of its members per se, but in the interests of the community. Consequently, if the community that the CIC serves is wider than the mutual self-interest community, the CIC, and its assets, are not managed exclusively in the interests of the mutual self-interest community.

Whether a mutual self-interest community can itself be the community that a CIC serves depends on the definition of 'community' in the CIC legislation. However, the term is never defined, save as to say that 'community' includes a section of the community.[104] A group of individuals will constitute a section of the community if

[103] Commonhold and Leasehold Reform Act 2002, s35(1).
[104] Companies (Audit, Investigations and Community Enterprise) Act 2004, s35(5).

'they share a common characteristic which distinguishes them from other members of the community' and 'a reasonable person might consider that they constitute a section of the community'.[105]

It is evident from that limited definition that a mutual self-interest community may meet the definition of a 'section of the community'. If it does, whilst the company and its assets are not managed in the members' interests per se, it is still managed in the interest of the mutual self-interest community, and the mutual self-interest characteristic is exhibited. However, if a mutual self-interest community does not meet the statutory definition, which it may not do if the community is particularly small, there will be others who are part of the community for the purposes of the CIC test, but who are not part of the mutual self-interest community, in whose interests the CIC and its assets are managed.

Therefore, for a CIC to exhibit the mutual self-interest characteristic, the mutual self-interest community must meet the community test in the CIC legislation. Whether the definition is met will have to be determined on a case by case basis, and cannot always be guaranteed. As such, the CIC exhibits only a very precarious version of the mutual self-interest characteristic, if at all.

Conclusion

Companies are managed according to the interests of their members. Consequently, provided that the company membership is drawn only from the membership of the mutual self-interest community, the mutual self-interest characteristic is exhibited. Furthermore, even if some members of the mutual self-interest community do not join the company, whilst the company would not be managed in their interest, it also would not be managed according to the interests of non-members of the community. On the other hand, CICs are less likely to exhibit the required characteristic. CICs are managed in the interests of the community, and the mutual self-interest community may not always meet the definition of a community in the CIC legislation.

[105] Community Interest Company Regulations 2005, regulation 5.

Homogeneity of interest

The homogeneity characteristic requires the interests of community members to be neither disparate or competing. Instead, the aims of the community should be settled, and all members should subscribe to, and pursue, a common objective. To that end, a company may state its objectives in its articles of association, to which all members of the company, and the company itself, are parties. It is of note that a company does not need to state its objectives, and if it does not do so it is treated as having unrestricted objects.[106] Nonetheless, a company will often state its objectives, as an objects clause tells members and prospective members why the company exists. In particular, where the company is a not-for-profit guarantee company set up to pursue particular aims, it is common practice to publicise the express aims of the company.[107] Therefore, it is possible, if not likely, that, where the company is used to secure a mutual self-interest common, homogeneity of interest may be achieved through the use of an objects clause in the articles of association. The express statement of purpose, to which all members must commit, limits the scope and likelihood of there being competing and disparate interests amongst community members.

However, objects clauses may actually be a blunt instrument in the pursuit of homogeneity of interest. Any acts of the company that are inconsistent with the objects of the company are, contrary to the historical position of company law, not considered ultra vires.[108] As such, the security of any acts of the company that are inconsistent with an objects clause cannot be threatened. Consequently, even if an objects clause provides that the company is to preserve a communal asset, those controlling the company may engage in transactions, such as transfers of company assets, that are not in accordance with the aims of the community. Protecting the security of such transactions means that the primary remedy available to members would be an action against the directors for exceeding the scope of the company's objects. Those actions would most likely produce only a remedy in damages, which would be inadequate where the resource itself has been lost as a result of the inconsistent action. Therefore,

[106] Companies Act 2006, s31(1).
[107] Mullen and Lewison n70 36.
[108] Companies Act 2006, s39.

on the whole, homogeneity of interest in a company is, at best, precarious, as the stated aims of a company can be undermined by those who control the company's actions.

A second threat to the homogeneity characteristic also exists. It is possible for company members, and thus the members of the community, to not hold the same species of legal interest in the company. In those circumstances, it is difficult to describe the interests of the members as homogenous. In particular, homogeneity of interest requires each member to hold the same quantity and class of shares, which are of the same value, and which have an equal voting right attached. If there is any disparity in the quantity, value, class or voting rights attached to shares, members' interests will not be homogenous. However, it is possible, and not uncommon, for a company to issue different classes of shares (usually divided between ordinary and preference shares), shares with weighted voting rights, and to issue varying quantities of shares according to the value of a shareholder's investment. Similarly, different classes or categories of membership may exist within a guarantee company, with different rights and obligations attached to each.

Where the company used to secure the mutual self-interest common is a CIC, the problem is further compounded. CICs may issue investor shares alongside those held by community members. Investor shares are often a vital source of funding for a CIC, and enable the company to conduct its activities. However, investor shares entitle the holder to a return of profits, and is the primary purpose for which they are acquired. As such, in a CIC, a class of shares may exist where the holder's interest is at odds with the interests of all other members. Investors' primary motivation is to see a return of profit, and they are only interested in the success or failure of the mutual self-interest common in so far as it relates to the generation of profit. As such, investors will use their voting rights to promote the profitability of the communal resource, irrespective of whether that profitability is at the expense of the community's interest and relationship with the resource.

Therefore, the legal structure of the share company, guarantee company and CIC all leave open the possibility that members may hold different interests in the company. To guarantee the exhibition of the homogeneity characteristic, the articles of association would need to remove any scope for the issuing of different classes of

shares or membership, weighted voting rights or members being permitted to hold more than one share at a time. It would be possible for such drafting to be achieved, but it could be prohibitively expensive for most communities, as the assistance of expert draftsmen would probably be needed. Furthermore, the reality of most companies, and particularly the CIC, is that at least some investor shares are likely to be needed to ensure that the communal resource is properly funded and maintained, and eradicating these from the company structure could in fact be detrimental to the mutual self-interest common.

Overall, the exhibition of the homogeneity characteristic is weak. Objects clauses may be undermined, and whether each member does in fact hold an identical interest in the company relies on the articles of association being drafted to limit the issue of different classes of shares. As such, assessments of the exhibition of the homogeneity characteristic must be conducted on a case by case basis.

Cohesive Community

Private share companies are prohibited from making a public offer of shares.[109] As such, a private company may control to whom shares are issued, with a view to pursuing cohesion. Therefore, a company may adopt a policy of only issuing shares to community members with the required connection to the communal resource. However, only issuing shares to community members does nothing to ensure that the community is itself cohesive; for example, it does not ensure that the community members are geographically proximate to each other or the resource.[110] Furthermore, there is also the risk that, even though shares are not issued to those from outside of the community, they may still be transferred to outsiders, making restrictions on alienations vital to the success of the mutual self-interest common.

To promote cohesiveness in the community, additional membership eligibility criteria, other than community membership, would need to be utilised. For example, a company's constitution may set residence of a specific geographical location as an eligibility criterion for membership. Such a criterion would promote community

[109] Companies Act 2006, s755.
[110] 'Introduction' p30.

cohesion in so far as cohesion is understood to be promoted though the geographical proximity of community members to each other and the resource. Mullen and Lewison note that it is usual for guarantee companies set up to promote particular activities, which could include the securing of a mutual self-interest common, to restrict membership to those with an interest in that particular activity and set membership criteria accordingly.[111] In particular, they give the example of a residence requirement and nomination by pre-existing company members. Furthermore, as noted earlier, membership of a commonhold association (which is a form of guarantee company) is restricted to unit holders,[112] thus promoting the cohesiveness of the community.

Overall, the company may promote community cohesion where appropriate membership eligibility criteria are used. It is important to note that any restriction on company membership must be compliant with anti-discrimination legislation, but it seems likely that a company can restrict membership to those from a particular geographical area, and geographical proximity is a key component of community cohesion. As such, if proper membership restrictions exist, a company can exhibit the community cohesion characteristic. However, the exhibition of the characteristic, as with the exhibition of the homogeneity characteristic, relies on the appropriate drafting of the articles of association.

Community interest companies

Community cohesion is an inherent feature of the CIC. A CIC must be for the benefit of the community not just its members. Section 35(5) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 states that 'community' includes a section of the community, with regulation 5 of the Community Interest Company Regulations 2005 clarifying that a group of individuals will constitute a section of the community if 'they share a common characteristic which distinguishes them from other members of the community' and 'a reasonable person might consider that they constitute a section of the community'. As such, there is a cohesiveness requirement built into the statutory test for a CIC.

[111] Mullen and Lewison n70 70.
[112] Commonhold and Leasehold Reform Act 2002, schedule 3 para 7 and para 10.

Nonetheless, the 2004 Act and 2005 Regulations do not ensure that the membership of the CIC displays the cohesion required in a mutual self-interest common. The test is concerned with the community that the CIC serves, not the mutual self-interest community and the membership of the company per se. Therefore, for the statutory framework to promote cohesion amongst the membership of the company, all members of the community that the CIC serves must also be members of the company.

Idiosyncratic regulation

Articles of association

Every company must have articles of association,[113] which form part of the company's constitution.[114] The articles of association are the rules of the company and regulate, inter alia, the relationship between company members, the company, directors and the company's assets. Therefore, if the community, as the members of the company, are able to draft the articles of association to reflect the rules it devises regarding the use and management of the communal resource, the idiosyncratic regulation characteristic may be exhibited.

Clarke argues that

> Idiosyncratic rules are possible, but it is not likely that they will be made initially, and most unlikely that they emerge over time. This is because the rights and duties of the directors and shareholders as against each other and as against outsiders are prescribed by the relevant statute, and in exhaustive detail. Generally, those are default provisions only, but varying them requires expert advice, and is likely to become difficult once rights have become entrenched.[115]

Clarke's reference to rights and duties prescribed by statute is a reference to the model articles of association. A company may either draft its own articles of association, adopt the default model articles, or adopt the model articles in an amended form.

[113] Companies Act 2006, s18.
[114] Companies Act 2006, s17.
[115] Clarke n1 351. Clarke's statement is made in the context of share companies, but applies equally to the other formats.

i. Model articles

The model articles of association are found in the Companies (Model Articles) Regulations 2008. Schedule 1 of the Regulations contains the model articles for share companies, and schedule 2 contains those for guarantee companies. Furthermore, model articles for a CIC are located in the Community Interest Company Regulations 2005. Where a company does not draft its own articles, or does not register any articles, it is treated as having adopted the model articles.[116] As default rules, the model articles of association cannot be described as idiosyncratic. Therefore, a company used for the purposes of securing a mutual self-interest common would need to adopt either bespoke or amended articles.

Further, commonhold associations must adopt a prescribed form memorandum of association, articles of association and community statement,[117] all of which govern the relationship between members of an association, including their rights and liabilities. As noted earlier, Clarke's view is that the provisions governing the rights and duties of unit owners in a commonhold and the directors of the commonhold association are overly prescriptive, and often mandatory.[118] Therefore, where those provisions prevail, the regulation of a commonhold cannot be described as idiosyncratic.

ii. Bespoke and amended articles

A company may draft its own bespoke articles of association, or amend the model articles to devise a scheme of idiosyncratic regulation for the company.[119] However, the model articles will continue to apply where the amended or bespoke articles do not exclude or modify them.[120] Furthermore, a commonhold association's community statement may be amended in accordance with section 33 of the Commonhold and

[116] Companies Act 2006, s20(1)(a).
[117] Commonhold and Leasehold reform Act 2002, s31 and s34; Commonhold Regulations 2004, schedules 1-3.
[118] Clarke n1 353-354.
[119] A court may imply terms into the articles, but will not imply a term that alters the express terms. Principles of construction are also qualified, as neither a member or company may add or subtract to the articles by implying a term derived from the surrounding circumstances, see *Towcester Racecourse Co Ltd v The Racecourse Association Ltd* [2002] EWHC 2141.
[120] Companies Act 2006, s20(1)(b).

Leasehold Reform Act 2002; although, some amendments may not be permitted pursuant to section 32(2) of the Act.

The cost of adopting bespoke or amended articles may be prohibitively expensive for some communities. Drafting such articles would probably require the company to engage the services of a company law practitioner, and would require a high degree of organisation, especially at the time of the formation the company. As such, Clarke's argument that a company is most likely to adopt the model articles of association on formation seems reasonable.

Clarke also argued that it is unlikely that idiosyncratic rules developed over time by the community will be enshrined in the articles of association. However, it is possible, by special resolution, to amend articles of association.[121] Special resolutions may be passed either as written resolutions or at a meeting of the members of a company,[122] and require a majority of no less than 75%.[123] Therefore, in principle, the articles can be amended to reflect changing idiosyncratic rules. Nonetheless, the process can be cumbersome, and may require the assistance of company law practitioners to ensure that all necessary formalities are complied with.

Finally, Clarke cites the entrenchment of some rights and duties as causing difficulty in amending the articles to reflect developing idiosyncratic regulation. 'Entrenchment' is a term of art in company law, and Clarke appears to use the term in its lay sense.[124] Her argument is better expressed as being that the passage of time will cause rules to become established and less likely to be amended. If that is in fact the argument that Clarke is making, it is unconvincing. The longevity of a rule does not affect its legal status or the members' ability to amend it. The only barriers to amendment would be the members' attitude towards long-standing rules, and whether they treat them as trite and an accepted feature of their governance, as well as the costs incurred by

[121] Companies Act 2006, s21(1).
[122] Companies Act 2006, s281(1).
[123] Companies Act 2006, s283.
[124] Entrenchment, in the context of company law, refers to the ease with which the articles of association can be amended. Articles may specify that some provisions may only be amended or repealed if certain conditions or procedures, which are more restrictive than those applicable in the case of a special resolution, are complied with: Companies Act 2006, s22. Articles that are subject to such conditions or procedures are described as 'entrenched'.

amendment. In any event, even if Clarke is using 'entrenchment' in its company law sense, entrenchment cannot make the articles of association unalterable.[125]

On the whole, if the difficulties concerning the cost of amendment and members' attitudes towards long-standing rules can be overcome, it is arguable that companies using bespoke or amended articles do exhibit the idiosyncratic regulation characteristic.

iii. Contractual nature

Articles of association meet the idiosyncratic regulation characteristic in so far as they bind every member of the company without the need for each member to contract separately with all others. To that end, section 33(1) of the CA 2006 provides

> The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and each member to observe those provisions.

The effect of section 33 is to create an enforceable contract between the members and the company, as well as the individual members.[126] Members are bound by the articles upon accepting membership of the company, and cease to be bound upon the termination of their membership, with no need to execute a separate contract with each member and the company itself to achieve such ends.

However, whilst section 33 aids the idiosyncratic regulation characteristic, it also contains an inherent weakness: only members of the company and the company itself are bound by, and able to enforce, the articles. As such, all members of the community must be members of the company in order to be subject to the scheme of regulation. Non-members are neither bound nor able to enforce the articles of association, irrespective of how close their relationship with the company.[127] Therefore, exhibition of the characteristic relies on the community membership mirroring the company

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[125] Companies Act 2006, s22(3).
[126] *Wood v Odessa Waterworks Co* (1889) 42 Ch D 636 at 642 (Stirling J), cited with approval in *Salmon v Quin and Axtens Ltd* [1909] 1 Ch 311, 318 (Farwell LJ).
[127] *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881, 900 (Astbury J). In addition, the provisions of the Contracts (Rights of Third Parties) Act 1999 do not apply to the constitution of a company (see s6(2) of that Act).

membership. If any members of the community hold out against membership, not all community members are bound by the regulation. However, as it is company membership that confers rights to the communal resource on community members, the problem of hold-outs is unlikely, as they would all be inclined to join.

Shareholder agreements

In a share company, shareholders may also develop self-governance rules through shareholder agreements. Such agreements exist outside of the articles of association, and are not usually considered as part of the constitution of the company. The agreement derives its contractual force from the normal principles of contract law, not the CA 2006. As such, shareholder agreements do not benefit from section 33(1) and the assent of new members, which may be hard to obtain, needs to be secured to ensure that all members are bound by the agreement.

Whilst the contractual nature of shareholder agreements is touted as an advantage in some circumstances,[128] it is a disadvantage for the purposes of idiosyncratic regulation. The introduction to this project ruled out the use of a series of private contracts between community members as a method of securing idiosyncratic regulation. In the absence of section 33 of the CA 2006 being engaged, shareholder agreements amount to nothing more than a series of such contracts; therefore, shareholder agreements do not enable a company to exhibit the idiosyncratic regulation characteristic.

Conclusion

In principle, provided all members of the community are also members of the company, articles of association enable the company to exhibit the idiosyncratic regulation characteristic. A company is free to adopt bespoke or amended articles, which reflect the idiosyncratic rules devised by the community. However, in practical terms, adopting bespoke or amended articles may be prohibitively expensive. Instead, communities forming a company are more likely to adopt model articles, which cannot be described as 'idiosyncratic'. Therefore, whether a company exhibits the

[128] *Gower Principles of Modern Company Law* n7 3-34.

characteristic must be determined on a case by case basis, and only if bespoke or amended articles are adopted will the characteristic in fact be exhibited.

Sanctions

Mutual enforcement

Whilst articles of association do not require a web of private contracts between company members, they are nonetheless treated as forming a contract, albeit a very particular statutory one with peculiarities.[129] Therefore, like all other contracts, articles are only enforceable by and against those who are parties to the contract.[130] In particular, case law has established that the statutory contract is enforceable by members in their dealings with a company,[131] the company in its dealings with its members as members,[132] and members in their dealings with other members without the need to join the company in any action to enforce the contract.[133] Assistance may be sought from the courts in the enforcement of those rights, but only the parties to the contract may bring proceedings. As such, the contractual nature of the articles ensures that the mutual enforcement limb of the sanctions characteristic is exhibited.

Ultimate sanction of exclusion

To exhibit the second limb of the sanctions characteristic, it must be possible to exclude members of the community from the communal resource if they breach the idiosyncratic regulation. Therefore, in the context of the company, it must be possible to exclude company members from the company's property if they breach the terms of the articles of association.

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[129] *Gower Principles of Modern Company Law* n7 3-18.
[130] Debate has arisen as to whether a member only can enforce their rights to benefit them in their capacity as a member, as opposed to conferring a benefit in some other capacity (such as a director). Furthermore, some duties in the articles will be owed to a company specifically, rather than to members. In those circumstances, it is for the company to enforce the obligation, although members of the company may seek to do so by means of a derivative action. However, these questions extend beyond the argument being made here, and are outside the scope of this project.
[131] *Hickman v Kent or Romney Marsh Sheep-Breeders' Association* [1915] 1 Ch 881.
[132] *Oakbank Oil Co v Crum* (1882) 8 App Cas 65.
[133] *Rayfield v Hands* [1960] Ch 1.

Being contractual in nature, the primary remedy for breaching the articles of association is an award of damages or, if damages are an inadequate remedy, the grant of an injunction or specific performance. Nonetheless, specific remedies can be provided for in the articles. Common specified remedies include forfeiture of shares for non-payment of amounts payable, and the removal of voting or other rights attached to shares if they are transferred in breach of pre-emption rights. Similarly, the articles may expressly provide for the expulsion of a member from a company, or limit the benefits to which a company member is entitled. Expelling a member from a company will terminate the member's right to benefit from the company and its property, and is tantamount to exclusion from the communal resource. The articles should set out the process through which expulsion may occur. In particular, the articles must set out the decision-making process that leads to expulsion, whether a members' vote is needed and, if it is, the majority required to achieve expulsion. It is also possible that articles may confer upon the directors the power to expel members; such a power may only be exercised in the interests of the company which, arguably, sanctioning a breach of the articles of association is.

Finally, the articles may make provision for the termination of membership where membership depends on the existence of some other legal relationship, and that relationship comes to an end. For example, a long lease of a flat may provide that the leaseholder must join a residents' management company. When the leasehold relationship terminates, the leaseholder no longer meets the qualifying condition for membership of the management company, and their membership is terminated. The same could apply to membership of a company used to secure a mutual self-interest common: if membership of the company is contingent on status as a community member, ceasing to be a community member, whether by expulsion or otherwise, may terminate company membership.

Whichever method of expulsion is used, the power to expel members must be expressly conferred by the articles of association, and may not be implied.[134] Members are bound to accept the sanctions as they are terms of the contract into which they entered when accepting membership of the company. However, additional concerns arise where the

[134] Mullen and Lewison n70 82.

company is a share company, as members cannot be expelled without provision being made for the transfer of their shares. As such, articles providing for expulsion must also set down the procedure through which the departing members' shares should be transferred and valued. Common provisions dealing with such matters include rights of pre-emption and company buy backs of shares, and the value to be paid for the shares is often set at fair market value. However, as the expulsion and transfer of shares is punitive, provision for a lower than market value payment is not uncommon.

One notable exception to the ability to exclude is found in section 31(8) of the Commonhold and Leasehold Reform Act 2002, which provides that 'a community statement may not provide for the transfer or loss of an interest in land on the occurrence or non-occurrence of a specified event'. Therefore, any breach of the community's idiosyncratic regulation cannot lead to the forfeiture of either the unit owner's interest in the common parts or the ownership of their unit, and they remain entitled under schedule 3 paragraph 7 of the 2002 Act to be a member of the commonhold association.

Overall, with the exception of the commonhold, the ability to include specific remedies and sanctions within the articles of association enables a company to exhibit of the second limb of the sanctions characteristic. However, whether a company does in fact exhibit the second limb will depend on the drafting of the articles, and must be determined on a case by case basis.

III. CONCLUSION

Clarke concluded that the corporate form was 'inappropriate – although not necessarily unworkable – for communal resource holding'.[135] Arguably, Clarke's conclusion is correct, although she did not distinguish between the different company formats, or consider the 2006 legislation.

To use a company as an ownership vehicle for a mutual self-interest common, the membership of the company must reflect the membership of the mutual self-interest

[135] Clarke n1 350.

community. Where that symmetry is achieved, in principle, some of the eight required characteristics are exhibited. However, whether many of those characteristics are in fact exhibited can only be determined on a case by case basis, and will depend on the drafting of a company's constitution. For example, non-statutory asset locks, classes of shares and the rights attached to them, membership eligibility, the rules of a company and sanctions for the breach of those rules may all enable the exhibition of some of the required characteristics (inalienability, homogeneity of interest, community cohesion, idiosyncratic regulation and sanctions respectively), but are flexible matters over which a company has control, and must detail its constitution. As such, the flexibility in the company format is both a strength and a weakness; it enables the exhibition of some characteristics, but cannot guarantee that exhibition.

Overall, whilst some characteristics are not exhibited, and the exhibition of others depends on the drafting of a company's constitution, companies can be made to work as an ownership vehicle for a mutual self-interest common, at least to some extent. Therefore, of the three ownership vehicles presented so far in this project, it is arguable that the company shows the greatest potential for securing a mutual self-interest common. This project shall now turn to consider two further corporate forms that may be used, and which are governed by their own statutory framework: co-operative and community benefit societies.

Chapter 5 | REGISTERED SOCIETIES

The fourth legal institution, and final ownership vehicle, examined by this project is the registered society. As with companies, registered societies enjoy corporate personality, and may hold the legal title to land. Similarly, if using a registered society to facilitate a community holding title to a mutual self-interest common, the membership of the society must mirror the membership of the community. There are many similarities and shared features between registered societies and companies, and chapter four should be considered alongside the present chapter.

This chapter will first outline the two species of registered society in English law. It will then demonstrate that, as with the company, registered societies may, in principle, exhibit some of the eight characteristics of a mutual self-interest common. However, whether a particular society does in fact exhibit the characteristics will depend on its constitution. The flexibility afforded to registered societies with regard to their constitution is both a strength and a weakness; the constitution may include provisions that aid the exhibition of the required characteristics, but, equally, the inclusion of those provisions and the exhibition of the characteristics are not guaranteed.

I. REGISTERED SOCIETIES

Registered societies are corporate bodies that enable community ownership of property, including land. 'Registered society' is a general term used to refer to societies governed by the Co-operative and Community Benefit Societies Act 2014 ('CCBSA 2014'), including co-operative and community benefit societies, as well as industrial and provident societies registered prior to the Act coming into force on 1 August 2014. The CCBSA 2014 consolidated all previous legislation[1] without changing its meaning, although all new societies are to be registered in the new formats of either a co-operative or community benefit society ('CBS'). The Financial Conduct Authority ('FCA') administers co-operative and CBSs in England and Wales, and is known as the 'registrar' for those societies.

[1] Industrial and Provident Societies Act 1965, Friendly and Industrial and Provident Societies Act 1968, Co-operative and Community Benefit Societies Act 2003.

Both co-operative societies and CBSs are limited liability. They are similar to share companies in that members' liability is limited according to the share capital they hold in the society. Societies are also similar to companies as they must adopt rules of association (the term 'rules' rather than 'articles' is used in the context of a society), subject to the provisions set out in sections 14 to 23 of the CCBSA 2014. However, registered societies do not benefit from model rules contained in secondary legislation, with model rules instead drafted by 'sponsoring bodies'.[2]

As corporate forms, there are many similarities between registered societies and companies. However, notwithstanding those similarities, they are different institutions with their own idiosyncrasies. Furthermore, whilst co-operatives and CBSs also share many characteristics and legislative provisions, they too are different creatures. As such, it is important to understand co-operatives and CBSs as distinct from each other, and the company format.

Co-operative societies

A co-operative society will only be registered if it is a 'bona fide co-operative society'.[3] It is for the FCA to decide whether a society is a bona fide co-operative, and it will do so in accordance with the definition and seven key principles of a co-operative set out in the International Co-operative Alliance Statement of Co-operative Identity.[4] Those principles are voluntary and open membership, democratic member control, member economic participation, autonomy and independence, education, training and membership, co-operation among co-operatives, and concern for the community. Furthermore, the FCA has produced guidance detailing how it applies the bona fide co-operative test, which re-emphasises the seven co-operative principles. [5]

[2] See https://www.fca.org.uk/firms/model-rules-sponsoring-bodies (last accessed 13 August 2019) for a list of the sponsoring bodies that have drafted model rules approved by the FCA.
[3] Co-operative and Community Benefit Societies Act 2014, s2(a)(i).
[4] Co-operatives UK, *Simply Legal: all you need to know about legal forms and organisational types* (2017) Appendix 1.
[5] Financial Conduct Authority, *Guidance on the FCA's registration function under the Co-operative and Community Benefit Societies Act 2014* (November 2015) 26-30.

There is no statutory guidance as to what a bona fide co-operative is, except for section 2(3) of the CCBSA 2014, which says that it

> does not include a society that carries on, or intends to carry on, business with the object of making profits mainly for the payment of interest, dividends or bonuses on money invested or deposited with, or lent to, the society or any other person.

The hallmark of a co-operative society is that the members run the society for their own benefit, making it a potentially useful vehicle for securing a mutual self-interest common. However, the open membership requirement is at odds with the definition of 'community' provided in the introduction to this project.[6]

Community benefit societies

Members do not run a CBS for their own benefit. Instead, the business of a CBS is 'conducted for the benefit of the community',[7] with any profit used accordingly. The FCA guidance clarifies that the business of the society must be entirely for the benefit of the community, ruling out any alternative secondary purpose.[8] Furthermore, 'community' can be interpreted to mean either the community at large or a defined community, as long as serving the needs of a defined community does not inhibit the benefit to the community at large.[9] As such, the CBS has an open-access outlook, and may not be suited to the role of securing a mutual self-interest common.

The other feature distinguishing a CBS from a co-operative is the availability of a statutory asset lock in a CBS.[10] The asset lock may be entered into at the time the society is established, or sometime afterwards, but may not be reversed once entered into. The statutory asset lock operates in a similar way to the asset locks found in community interest companies ('CIC') and charities; they restrict alienations of the society's assets, and prevent the assets from being shared amongst the members of the society should the society be dissolved.

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[6] 'Introduction' pp17-21.
[7] Co-operative and Community Benefit Societies Act 2014, s2(2)(ii).
[8] Financial Conduct Authority n5 31.
[9] Ibid.
[10] Co-operative and Community Benefit Societies Act 2014, s29; Community Benefit Societies (Restriction on Use of Assets) Regulations 2006.The rules of a co-operative society may set out a non-statutory asset lock.

Limitations

Registered societies suffer an inherent limitation if being used to hold title to a mutual self-interest common. Section 2(1) of the CCBSA 2014 provides that a society can only be registered if it is 'a society for carrying on any industry, business or trade'. As such, and in contrast to the company formats, a society cannot simply be used as a holding mechanism, and some activity must occur.

The requirement that an industry, business or trade must be carried on may suit some mutual self-interest common arrangements, especially where the assets of the society are put to a productive use to deliver a tangible benefit to a community, as in the case of agricultural land. However, the activities of the community will not always meet the definition of industry, business or trade, as in cases where the land is held for the purposes of community recreation. Nonetheless, even a brief sampling of societies that have met the industry, business or trade definition suggests that most community ownership projects can meet the requirement in section 2(1). For example, societies created for the purposes of providing a community owned arts, cinema and theatre complex have been successfully registered, as have societies for the purposes of restoration and maintenance of a local pier.[11]

Furthermore, both the statute[12] and practical guidance for societies[13] emphasise that dealings with land of any kind will amount to a 'trade'. It is likely that many of the activities carried on by a community making use of a mutual self-interest common can be categorised as dealings with land, especially as it is anticipated that modern commons are most likely to be concerned the recreational use of land. Therefore, societies used to hold the communal resource may meet the requirement in section 2(1). Overall, much will turn on the FCA's interpretation of the 'industry, business or trade definition', but it seems that the definition is wide, and can encompass the mutual self-interest commons envisaged by this project.

[11] See Co-operatives UK, *Community Benefit Societies: what, why and how to start or convert to one* (2017) for a sample of case studies.
[12] Co-operative and Community Benefit Societies Act 2014, s2(1).
[13] I Snaith*, Handbook of Co-operative and Community Benefit Society Law* (Jordan Publishing 2014) 60.

The use of registered societies

Due to their shared underlying concept, registered societies are best used to secure a mutual self-interest common in the same instances in which other corporate forms are best used: instances in which the community wishes to acquire a resource from a third party who is not a community member.[14]

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

Like companies, registered societies are legal persons and can hold the legal title to land. Similarly, as a general rule, the assets of a registered society are freely alienable, and alienations will defeat the communal rights over those assets, with new rights arising over any substitute. Therefore, as with the company, the first limb of the inalienability characteristic does not appear to be exhibited, with the communal resource valued as wealth, rather than for its intrinsic qualities as a thing.

To prevent alienations that defeat communal rights, registered societies are also able to make use of both statutory and non-statutory asset locks. These asset locks are the same as those found in company law in that they prevent or restrict alienations, and equally raise the objection that a complete prohibition on alienations may in fact be undesirable.

i. Statutory asset locks

Co-operative societies do not benefit from statutory assets locks. Conversely, most, but not all, CBSs benefit from the option of statutory asset locks.[15] Unlike a CIC, a CBS can opt whether to adopt a statutory asset lock.[16] The asset lock may be adopted either

[14] 'Companies' p102.
[15] Co-operative and Community Benefit Societies Act 2014, s29 and the Community Benefit Societies (Restrictions on Use of Assets) Regulations 2006. Registered social landlords and charities are unable to adopt statutory asset locks, see Community Benefit Societies (Restrictions on Use of Assets) Regulations 2006, regulation 5.
[16] CIC statutory asset locks are considered in 'Companies' pp104-108.

on registration, or by the passing of a special resolution [17] after registration. Consequently, the CBS statutory asset lock may be viewed as less effective at preserving assets than CIC asset locks. Nonetheless, the asset lock, once adopted and included in the rules of a CBS, cannot be undone.[18] The wording of the asset lock provision that should be included in the rules of the CBS can be found in schedule 1 of the Community Benefit Societies (Restrictions on Use of Assets) Regulations 2006, which is almost identical to the statutory provision that confers the power to restrict the use of CBS assets at section 29 of the CCBSA 2014. Schedule 1 makes clear that the terms of any statutory lock adopted must be in the terms provided for in schedule 1.

As with the CIC statutory asset lock, it is somewhat misleading to describe the assets of a CBS as 'locked'. Pursuant to schedule 1, many uses and dealings with assets are still permitted. In summary, assets may be used or dealt with where that use or dealing is directly or indirectly for a purpose that is of benefit to the community, to pay a member the value of their withdrawable share capital or interest on that capital, to make payments permitted by the CCBSA 2014, to pay creditors on dissolution or winding up, or if the use or dealing is to transfer assets to other asset-locked bodies (including charities).

Given the many similarities between the CIC and CBS statutory asset locks, the arguments raised as to why the CIC asset lock provisions do not enable the exhibition of the first limb of the inalienability characteristic[19] also apply to the CBS provisions. In addition to those arguments, Snaith argues that the wording of the provision permitting dealings that are directly or indirectly for the benefit of the community captures a wide scope of transactions.[20] Whilst Snaith is of the view that 'benefit' should be interpreted to mean benefits that relate to the stated object(s) of the CBS, his view is that permitting direct or indirect benefits 'emphasises the breadth of the concept linking the purpose for which the asset is used or for which the dealing takes place with the community benefit that is the society's object.'[21] As such, Snaith would likely argue

[17] See the Co-operative and Community Benefit Societies Act 2014, s113 for the requirements of passing a special resolution.
[18] Community Benefit Societies (Restrictions on Use of Assets) Regulations 2006, regulation 7.
[19] 'Companies' pp104-108.
[20] Snaith n13 88.
[21] Ibid.

that almost any transfer of assets could be described as beneficial to the community, and would therefore be permitted, as the capital sum raised from the transfer could be applied to further the object(s) of the society. That argument reinforces that the asset lock provisions are only designed to lock the value of the assets as opposed to the assets themselves, treating them as wealth and not valuing them for their inherent qualities as a thing.

However, defining community 'benefit' by reference to the objectives of the society could in fact make the asset lock provisions more successful when securing a mutual self-interest common. If the objectives of a CBS were stated as the preservation and provision of a specifically identified resource as a mutual self-interest common, only transactions that furthered that objective would be permitted under the banner of 'community benefit'. As such, the resource could be protected from alienation, going some way to meeting the first limb of the inalienability characteristic. As with the CIC, there is no statutory guidance as to how 'benefit' should be interpreted but, if Snaith is correct in his assertion, the asset lock provisions of a CBS may actually be more effective.

Nonetheless, on the whole, the CBS statutory asset lock is just as unsatisfactory as its CIC counterpart. Alienations of the society's assets can occur in a wide set of circumstances, and the real concern is the preservation of the value of the asset as opposed to the asset itself. As such, the CBS statutory asset lock provisions do not exhibit the first limb of the inalienability characteristic.

ii. Non-statutory asset locks

Both co-operatives and CBSs may adopt non-statutory asset locks in their rules of association. Those non-statutory asset locks may mirror the statutory asset lock, or may lock in assets through other means, such as by requiring the consent of all members before any transfer of assets are made. Being non-statutory, there is no standard form that the asset lock provisions must take, and no standard effect that they must have. Therefore, non-statutory asset locks may be less stringent than those with a statutory basis, and even less effective in securing the first limb of the inalienability characteristic.

Furthermore, non-statutory asset locks are grounded in the constitution of the registered society, which can be amended.[22] The asset lock provisions may be entrenched to make amendments difficult, but entrenchment cannot prevent the amendment of the rules altogether.[23] As such, non-statutory asset locks can be modified and removed, and cannot provide an absolute guarantee that the assets of the registered society will not be alienated.

Therefore, even if a registered society does adopt a non-statutory asset lock, which it is not bound to do, it is still possible that assets may be alienated. As such, whether a registered society adopting a non-statutory asset lock does in fact exhibit the second limb of the characteristic will depend on the terms of that asset lock, and whether it is subsequently modified.

iii. Asset locks and the rule against inalienability

It was argued in chapter four that CIC asset locks are compatible with, and do not offend, the rule against inalienability.[24] As registered societies enjoy corporate personality in the same way a CIC does, it is also the case that asset locks in a registered society do not fall foul of the rule against inalienability.

Severance and alienation of a discrete share

As with companies, registered societies own their property, not the members. Therefore, members of a registered society only have an interest in the society, not its assets. However, as with companies, it is still possible, in some circumstances, for a member to transfer their interest in the registered society to a third party who may not be from the community. Transferring that interest will entitle the transferee to any distributions of assets made by the society, subject to any asset lock provisions. Therefore, a member transferring their share is tantamount to the severance and transfer

[22] Amendments to rules of association are considered in the discussion concerning idiosyncratic regulation. In short, amendments to the rules of a registered society are governed by the rules themselves: Co-operative and Community Benefit Societies Act 2014 s14(5).
[23] Companies Act 2006, s22(3) and 22(4).
[24] 'Companies' pp109-110.

of a discrete interest in the communal property, even if the members do not strictly have an interest in the society's assets.

Societies are limited by shares and must have share capital. Those shares may be issued as either transferrable or withdrawable shares. The rules of the society must state whether any or all shares are transferrable, provide for the form of transfer and registration of those shares, and include provisions relating the committee's consent to transfer or registration.[25] The FCA's view is that issuing transferrable shares may lead to a market in society shares, which allows capital gains for members, and is inconsistent with registration as a society.[26] In particular, the FCA is concerned that the issue of transferrable shares encourages members and officials to operate the society for capital gain, as opposed for the benefit of the community.[27] As such, the FCA may not allow the registration of a society as either a CBS or co-operative society if it issues either all or the majority of its shares as transferrable shares.

Nonetheless, it is still possible for a society to issue transferrable shares to members, and for those shares to be transferred outside the community. The transferability of those shares precludes the exhibition of the second limb of the inalienability characteristic, for the same reasons as the transfer of shares in a share company.[28]

Furthermore, section 37 of the CCBSA 2014 makes provision for the transfer of a member's entitlement to the society's property upon their death (whether that interest is shares, deposits, loans or otherwise). As such, section 37 reinforces the discrete nature of the interest that each member holds in a society, and its transferrable nature, and undermines a registered society's exhibition of the second limb of the inalienability characteristic.

[25] Co-operative and Community Benefit Societies Act, s14.
[26] Financial Conduct Authority n5 35.
[27] Ibid.
[28] 'Companies' pp111-112.

Conclusion

Registered societies do not exhibit either limb of the inalienability characteristic. As to the first limb, the assets of a society are freely alienable, and are not burdened with the interests and entitlements of the community when alienated. Asset locks may prevent alienations, but only the CBS benefits from statutory asset locks, with co-operative societies forced to rely on non-statutory means. In any event, statutory asset locks continue to view the communal resource as wealth, as opposed to a thing with its own intrinsic value, and allow alienations that deliver a financial benefit. Furthermore, non-statutory asset locks can be amended or removed from the rules, and cannot guarantee inalienability.

As to the second limb, members hold a discrete interest in the society and, consequently, an entitlement to a discrete benefit or share of the society's property. Where a member's share is transferrable, those interests may be transferred to non-community members. Consequently, community members have a severable and transferrable share in the common resource, and the second limb of the inalienability characteristic is not exhibited.

Perpetuity and intergenerational equality

Like companies, registered societies are an artificial person with corporate personality. They benefit from perpetual succession and, whilst the rules of a society may fix the period of its duration, it is rare for them to do so. As such, registered societies appear to exhibit the perpetuity and intergenerational equality characteristic, with future generations of members able to enjoy the same entitlement to the resource as present members.

However, as is also the case with companies, the perpetual existence of a registered society is qualified, as it is possible to terminate the society. In particular, termination may occur through winding up and dissolution, as well as suspension and cancellation. Unlike amalgamations of societies, takeovers or transfers of engagements, which change the identity of the society that holds the communal resource, winding up and

dissolution, and suspension and cancellation, destroy the society and the common-property regime.

Winding up and dissolution

The winding up of a registered society is governed by the Insolvency Act 1986, with few substantive differences to the law governing the winding up of companies.[29] A solvent society may either be wound up voluntarily by its members and then dissolved pursuant to section 123 of the CCBSA 2014, or may simply be dissolved pursuant to sections 119 to 122 of the CCBSA 2014. Insolvent societies may be wound up by a creditors' voluntary liquidation or by court order, and will be dissolved pursuant to section 123 of the CCBSA 2014. Any surplus assets on winding up will be distributed according to the rules of the society, including any asset lock provisions; if the rules are silent, distributions will be made to the members.

Given the similarities in the winding up provisions applicable to companies and registered societies, the observations and analysis offered in chapter four[30] applies equally to registered societies, and nothing further needs to be added.

Suspension and cancellation of registration

A registered society may also be terminated through either the cancellation or suspension of its registration. Cancellation may occur pursuant to the provisions in sections 5 to 7 of the CCBSA 2014, with suspension governed by section 8. In short, the FCA may cancel a society's registration if (a) the society itself requests cancellation, (b) the registration was made by fraud or mistake, there are too few members, or the society ceases to exist, (c) there is an illegal purpose or wilful violation of the CCBSA 2014, (d) the society fails to meet the co-operative or community benefit society registration requirement, or (e) the society was an agricultural, horticultural or

[29] For a summary of those differences see Snaith n13 chapter 12.
[30] 'Companies' pp116-118.

forestry society and no longer qualifies as such.[31] Grounds (c)-(e) may also be used to justify a society's suspension.[32]

If a society's registration is suspended or cancelled it will cease to be entitled to any of the privileges of a registered society. Practically, this means that, if the community continues to hold and manage the communal resource after deregistration, it is unable to avail itself of the benefits of limited liability and corporate personality. Instead, property will be held on the model of an unincorporated association or, if the community carries on a business for a profit, it may be an unregistered partnership. Either way, the cessation of corporate personality is fatal to the perpetuity and intergenerational equality characteristic of a mutual self-interest common. The communal resource will be treated as a personal asset and liability of the individual members, with no perpetual succession to future community members. As such, the threat and prospect of deregistration or suspension of a registered society's status limits the extent to which a society exhibits the perpetuity and intergenerational equality characteristic.

Conclusion

Registered societies do not exhibit the perpetuity and intergenerational equality characteristic. At first glance, corporate personality and perpetual succession appears to enable the exhibition of the characteristic, but this is undermined by the ability to terminate the registered society, through either winding up or suspension and cancellation of society registration.

Exclusion of non-members

The registered society shares with the company the same broad analysis of the exclusion characteristic.[33] First, benefits incidental to society membership may only be enjoyed by members of the society, although this is not enough to exhibit the characteristic. Second, as it is the registered society that holds the legal title to the

[31] Co-operative and Community Benefit Societies Act 2014, s5.
[32] Co-operative and Community Benefit Societies Act 2014, s8(1).
[33] 'Companies' pp118-122.

communal resource, the directors (or 'officials', depending on the terminology used by the society), acting in the name of the company, and not the community, hold the power to exclude third parties from the resource. Whilst it is likely that the directors will themselves be members of the community and inclined to exclude non-members, that state of affairs cannot be guaranteed.

However, society members do not enjoy the same indirect exclusion powers as company members. In chapter four it was argued that company members may compel directors to exercise their exclusion powers through either derivative actions for breach of duty or unfair prejudice petitions.[34] Members of a registered society cannot use the same actions to compel directors' decisions. Whilst society directors owe duties to a society in the same way as a company director owes duties to a company, the CCBSA 2014 does not provide for derivative actions and unfair prejudice petitions. As such, society members do not benefit from being able to use these mechanisms to compel a director to exercise their exclusory powers. Therefore, in a registered society, directors' duties are only enforceable by the society and those who act on its behalf, with no mechanism to allow members to commence proceedings for breach of duty. Therefore, the community, as society members, do not enjoy any direct or indirect powers to exclude non-members of the community.

Finally, the CBS shares an additional layer of complexity with the CIC. A CBS and CIC must conduct their business for the benefit of a community, not just the benefit of its members. Therefore, if the community that the CBS serves is wider than the mutual self-interest community, the directors may not be able to exclude non-members of the mutual self-interest community from accessing the communal resource.

Overall, registered societies do not exhibit the exclusion of non-members characteristic. The community must rely on the directors of the society to exclude non-members of the community, and have no power to compel directors' decision-making in the exercise of their exclusion powers.

[34] 'Companies' pp120-122.

Mutual self-interest

A mutual self-interest common must be governed according to the interests of the community, not the public interest. To that end, as the membership of a registered society used to secure a mutual self-interest common must reflect the membership of the community, to exhibit the mutual self-interest characteristic, the society must be governed exclusively in its members' interests.

As with a company, the day-to-day activities of a registered society are conducted by a board of directors, although some societies use the terminology 'committee' and 'officials' instead. Depending on the size of the society and its rules, all members may be appointed directors, or a select few may be elected to office. Similarly, the rules of the society must stipulate the powers that are delegated to the board.[35]

Society directors owe duties to the society, most of which mirror the duties of company directors. However, unlike company law, the core duties owed by society directors have not been codified in statute, and remain as common law rules and equitable principles. Nonetheless, sections 170(3) and 170(4) of the Companies Act 2006 ensure that some post-2006 case law, as well as general developments in the wider context of fiduciary duties, may still be relevant in interpreting the duties owed by society directors.[36]

In light of the above, society directors are not subject to the statutory duty at section 172 of the Companies Act 2006. That duty, as discussed in chapter four,[37] requires directors to promote the success of the company, with the members' interests as the primary consideration. Nonetheless, society directors are subject to a correlative common law duty to act in good faith and what they consider to be the best interests of the society, and not for any collateral purpose. The interests of the society are taken to be the interests of the members as a whole, both present and future.[38] Therefore,

[35] Co-operative and Community Benefit Societies Act 2014, s14(6).
[36] Snaith n13 146.
[37] 'Companies' pp123-125.
[38] *Greenhalgh v Aderne Cinemas Ltd* [1951] Ch 286, 291 (Evershed MR).

directors are subject to the duty to manage the society, and its assets, according to the interests of the society's members.

As such, it appears that the mutual self-interest characteristic is exhibited. However, a distinction must be drawn between the operation of the common law duty in a co-operative and a CBS.

Co-operative societies

A co-operative society is run for the benefit of its members. Therefore, where the membership of the co-operative mirrors the membership of the mutual self-interest community, the duty to manage the society according to the members' interests enables the co-operative to exhibit the mutual self-interest characteristic. Even if some members of the mutual self-interest community do not join the co-operative, whilst the co-operative would not be managed in their interest, it also would not be managed according to the interests of third parties.

Community benefit societies

Conversely, a CBS is run for 'the benefit of the community'.[39] Therefore, the members' interest that should be pursued by the directors is the delivering of a benefit to the community. As such a CBS is not managed in the interests of its members per se, but in the interests of the community. Consequently, if the community that the CBS serves is wider than the mutual self-interest community, the CBS, and its assets, are not exclusively managed in the interests of the mutual self-interest community.

Whether a mutual self-interest community can itself be the community that a CBS benefits depends on the definition of 'community' in the context of a CBS. To that end, the FCA guidance clarifies that 'community' can be interpreted to mean either the community at large or a defined community, as long as serving the needs of a defined community does not inhibit the benefit to the community at large.[40]

[39] Co-operative and Community Benefit Societies Act 2014, s2(2)(ii).
[40] Financial Conduct Authority n5 31.

A mutual self-interest community would probably meet the 'defined community' element of the test. If it does, whilst the society and its assets are not managed in the members' interests per se, it is still managed in the interest of the mutual self-interest community, and the mutual self-interest characteristic is exhibited. However, the second limb of the test in the FCA guidance is problematic. The requirement that the community at large should also benefit from the CBS suggests an open-access, and not a limited-access, regime. The question left unresolved by the guidance is whether the society and its assets must be managed with the benefit to the wider community as the primary consideration, or whether the society may be managed according to the interests of a defined community, with tangential benefits to the wider community satisfying the guidance. It is likely that that the former option is correct, otherwise there would be little difference between a co-operative and CBS, and arguably no need for two distinct registered society formats.

Therefore, unlike the co-operative, the CBS does not exhibit the mutual self-interest characteristic. A CBS is not managed in its members interests, and even if the mutual self-interest community is the 'defined community' that the CBS benefits, regard must still be had for the interests of the community at large.

Homogeneity of interest

Unlike companies, a registered society must have an objects clause in its constitution.[41] The objects clause may be broad, but not so broad as to make it meaningless. For example, the FCA suggests that the object to 'benefit the community' is insufficient.[42] The need for specifity in an objects clause may promote homogeneity of interest amongst the members, as the members must unite in the pursuit of that stated aim. However, two factors preclude the exhibition of the homogeneity characteristic.

First, as with companies that voluntarily adopt objects clauses, the security of a registered society's acts cannot be challenged on the grounds of those acts being

[41] Co-operative and Community Benefit Societies Act 2014, s14.
[42] Financial Conduct Authority n5 18.

inconsistent with an objects clause.[43] The primary remedy available for any breach of an objects clause is a personal claim against the directors, which would most likely result in a remedy in damages, and certainly not the setting aside of the acts that are outside the scope of the stated objects. Therefore, as with the company, objects clauses are a blunt instrument in ensuring homogeneity of interest amongst a community. Competing and disparate interests are not eradicated, and those controlling the society may pursue interests that are contrary to the stated aim of the society, with limited consequences for doing so.

Second, not all society members may hold the same species of interest in the society. Registered societies are limited by shares, and two different classes of shares may be issued: withdrawable and transferrable shares.[44] As with share companies, if a society issues different classes of shares across its membership, members' interests cannot be described as homogeneous. In particular, the primary interest of shareholders who hold transferrable shares is likely to be in pursuing capital gains to enhance the value of their investment. In contrast, shareholders who hold withdrawable shares are likely to be interested in serving the community, as there is little financial reward or incentive for the holding of such shares.

Notwithstanding the similarities between company and society shares, the FCA's view is that society shares are unique. Unique features of society shares include that the number of shares issued can fluctuate significantly, they remain at par value (unless expressed otherwise), they do not automatically give the shareholder a share in the underlying value of the society, they cannot be held by the issuing society itself and they do not carry votes in proportion to the amount of shares held.[45] However, none of these unique characteristics enhances the homogeneity of members' interests,[46] or does anything to mitigate the harm done to the homogeneity characteristic by the issuing of different classes of shares. Instead, the only homogenising characteristic of CBS shares arises because the FCA expects all shares to be issued on a one-member-one-vote basis,

[43] Co-operative and Community Benefit Societies Act 2014, s43(1).
[44] The preference is for withdrawable shares; the FCA is wary of transferrable shares and creating a market in society shares: Financial Conduct Authority n5 35.
[45] Financial Conduct Authority n5 34.
[46] With perhaps the exception of voting rights not being determined in proportion to the number of shares held.

as it is not usually appropriate for one group of CBS members to have greater rights or benefits than others, as the society is for the benefit of the community.[47]

Overall, the exhibition of the homogeneity characteristic is weak. Objects clauses may be undermined, and whether each member does in fact hold an identical interest in the society relies on the rules of association being drafted to prevent the issue of different classes of shares. As such, assessments as to the exhibition of the homogeneity characteristic must be conducted on a case by case basis.

Cohesive Community

Co-operative societies

The first principle of the International Co-operative Alliance Statement of Co-operative Identity is that the membership of a co-operative must be open to all persons able to use its services and willing to accept the responsibilities of membership.[48] As such, cohesion amongst the members of a co-operative society may be lacking; the society may struggle to only issue shares to the members of a specific community with the required connection to the communal resource. However, notwithstanding the principle of open membership, it is recognised that qualification criteria for membership may be appropriate. For example, membership of a worker co-operative may only be open to employees.[49] Membership would still be 'open' in the sense that it is available to *all* employees using the services of the co-operative and willing to undertake membership responsibilities.

However, it is not enough to just draw society members from a limited class to promote cohesion, and further controls are needed to ensure that the limited class fulfils the requirements of a mutual self-interest community. To that end, and as was argued in chapter four in the context of the company, additional membership eligibility criteria, other than community membership, must be utilised.[50] For example, setting residence of a specific geographical location as an eligibility criterion for membership would

[47] Financial Conduct Authority n5 32.
[48] Co-operatives UK n4 Appendix 1. See also Financial Conduct Authority n5 28.
[49] Snaith n13 104.
[50] 'Companies' p129-130.

promote community cohesion, in so far as cohesion is understood to be promoted though the geographical proximity of community members to each other and the resource.

Therefore, only if a co-operative adopts suitable membership eligibility criteria will community cohesion be exhibited, otherwise there is nothing inherently cohesive about the community that forms the membership of the society. Whether a society does in fact exhibit the cohesion characteristic can only be determined on a case by case basis, and will turn on the inclusion of appropriate clauses in the rules of association.

Community benefit societies

There is little difference to be drawn between co-operatives and CBSs in the context of the cohesion characteristic, save as to say that, as CBSs are not subject to an open membership requirement, it is probably easier for them to adopt additional membership eligibility criteria. Even so, the adoption and effectiveness of those criteria can still only be assessed on a case by case basis, and whether a CBS exhibits the cohesion characteristic will also turn on the drafting of its rules of association.

Idiosyncratic regulation

The rules of a registered society are similar to the articles of association of a company; they form part of a society's constitution and govern the relationship between the members, the society, the directors and the society's assets. Therefore, if the community, as the members of the society, are able to draft the rules to reflect idiosyncratic practices regarding the use and management of the communal resource, the idiosyncratic regulation characteristic may be exhibited.

Unlike the articles of association of a company, there are no statutory model rules that can be adopted. Instead, section 14 of the CCBSA 2014 sets down the matters for which the rules of society must provide. As a general rule, subject to section 14, a registered society may adopt whatever rules it wishes, subject to two qualifications. First, the rules of a registered society must not be unlawful at common law. Second, the FCA must be satisfied that the rules of a co-operative comply with the co-operative principles, and

that CBS rules benefit the community. Therefore, as a registered society has the freedom to draft its own bespoke rules, and there are no default provisions that must be expressly overridden, it is arguable that the idiosyncratic regulation characteristic is exhibited.

However, sponsoring bodies have produced model rules that may be adopted by registered societies for a fee. Adopting bespoke rules can be expensive and time consuming. Using rules prepared by sponsoring bodies will probably be more attractive to communities, as it will be quicker and cheaper to establish the society, although the rules can be quite restrictive.[51] Where model rules are adopted, the regulation of the society cannot be described as idiosyncratic. Nonetheless, once registered, the rules of a society may be altered[52] to reflect rules and practices developed by the community, although the cost of making such amendments may prove prohibitively expensive for some communities.

Contractual nature

Section 15(1) of the CCBSA 2014 is drafted in similar terms to section 33(1) of the Companies Act 2006 and provides

> (1) A registered society's registered rules bind the society and all its members and all persons claiming through them to the same extent as if –
>
> (a) each member had subscribed the member's name and affixed the member's seal to the rules and
>
> (b) there were contained in the rules a covenant on the part of each member and any person claiming through the member to observe the rules (subject to the provisions of this Act).

The similarities between section 33(1) of the 2006 Act and s15(1) of the CCBSA 2014 suggests that the rules of a registered society and the articles of association of a

[51] Co-operatives UK n4 32.
[52] Pursuant to section 14(5) of the CCBSA 2014 the rules themselves must make provision for amendments, as there is no statutory process detailed in the CCBSA. However, Section 15(2) of the CCBSA 2014 lists amendments that will not bind a member if they are made once he has become a member, and some common law restrictions on amendments also exist. See Snaith n13 98-100 for a summary of the common law limitations on amendments.

company have the same effect.[53] As such, the rules of a registered society should be understood as conferring rights and imposing duties on members of the society without proof of a contract between them at common law. A contract is formed between both the members and the society, and between individual members, with new members automatically bound by the rules. There is no need for the execution of a series of private contracts between each member, which is helpful, as the introduction to this project dismissed the use of such contracts as a viable option for securing idiosyncratic regulation. As such, section 15(1) of the CCBSA 2014 aids the exhibition of the idiosyncratic regulation characteristic.

However, the similarities between sections 15(1) of the CCBSA 2014 and 33(1) of the 2006 Act also means that they suffer from the same inherent weakness: only members of the society and the society itself are bound. Therefore, all members of the community connected to the mutual self-interest common must be members of the registered society in order for the rules to provide effective self-governance.

Conclusion

In principle, the rules of a registered society exhibit the required characteristic of idiosyncratic regulation. Members of a registered society have free reign to set and amend the content of the rules, provided certain core matters are provided for. However, in practical terms, adopting bespoke rules may be prohibitively expensive for some communities. Instead, many communities forming a registered society are likely to adopt model rules prepared by sponsoring bodies, which, if they remain unaltered, cannot be described as 'idiosyncratic'. Therefore, whether a registered society exhibits the idiosyncratic regulation characteristic must be determined on a case by case basis, and only if bespoke or amended rules are adopted will the characteristic in fact be exhibited.

[53] Snaith n13 84.

Sanctions

Mutual enforcement

The rules of a registered society are the same as a company's articles of association in that they are treated as forming a contract. Therefore, the analysis offered in chapter four regarding the mutual enforcement limb of the sanctions characteristic applies equally to registered societies.[54] Nothing more needs to be added here, and it is suggested that the first limb of the sanctions characteristic is exhibited.

Ultimate sanction of exclusion

Similarly, there are no substantial differences between companies and registered societies in the analysis of the second limb of the exclusion characteristic. In the first instance, the remedy for breaching the rules is an award of damages, or specific performance or an injunction if damages are inadequate. Nonetheless, the rules themselves may provide for specific sanctions and remedies should a member breach the idiosyncratic regulation, which may include expulsion from the society and its assets, which is tantamount to expulsion from the communal resource.[55]

Snaith argues that it is desirable that a society should include express powers of expulsion in its rules. In particular, he argues that societies need to protect themselves against members whose actions or behaviour would damage or destroy the society and the pursuit of its objectives.[56] Furthermore, he argues that the power to exclude members should be expressly provided for in the rules, as there is conflicting case law as to whether such a power can be implied simply on the basis that it is necessary to achieve the object of the society as set out in its constitution.[57]

[54] 'Companies' p136.
[55] 'Companies' p137.
[56] Snaith n13 109.
[57] Ibid.

Conclusion

The analysis offered in chapter four regarding the sanctions characteristic applies equally to registered societies. The contractual nature of the rules of a registered society ensures that the mutual enforcement limb of the sanctions characteristic is exhibited, and also enables the inclusion of specific remedies and sanctions, such as exclusion. Therefore, provided the rules are drafted to include express expulsion provisions, both limbs of the sanctions characteristic are met.

III. CONCLUSION

Clarke, in her 2006 study, considered corporate forms collectively, and did not distinguish between the company and registered society formats. However, whilst registered societies share many similarities with companies, they are their own creature, with their own statutory framework, and should be considered separately. In addition, 'registered society' is an umbrella term referring to both co-operative and CBSs. However, both have their own idiosyncrasies and, at times, it is also necessary to consider these as distinct formats.

As with a company, using a registered society as an ownership vehicle for a mutual self-interest common relies the on membership of the society reflecting the membership of the mutual self-interest community. Where that symmetry is achieved, in principle, some of the eight required characteristics are exhibited. However, whether many of those characteristics are in fact exhibited can only be determined on a case by case basis, and will depend on the drafting of a society's constitution. For example, non-statutory asset locks, classes of shares, membership eligibility, the rules of a society and sanctions for the breach of those rules may all enable the exhibition of some of the required characteristics (inalienability, homogeneity of interest, community cohesion, idiosyncratic regulation and sanctions respectively), but are flexible matters over which a society has control, and must detail its constitution. Consequently, as with the company, the flexibility in the registered society format is both a strength and a weakness; it enables the exhibition of some characteristics, but cannot guarantee that exhibition.

Overall, whilst some characteristics are not exhibited, and the exhibition of others depends on the drafting of a society's constitution, registered societies can be made to work as an ownership vehicle, at least to some extent. However, it is arguable that the company is the more suitable corporate form to hold title to a mutual self-interest common, for at least three reasons. First, companies are not subject to the requirement that they must carry on an 'industry, business or trade'.[58] Whilst this chapter has argued that a registered society used to hold title to a mutual self-interest common should meet that test, the issue does not arise with the company format, making the company a more certain prospect. Second, both co-operatives and CBSs issue shares. On the other hand, the company format allows for guarantee companies, which are typically used for not-for-profit organisations. In particular, a guarantee company can better exhibit the inalienability characteristic if its articles prevent distributions to members, as members are not treated as having a discrete share in the company.[59] Finally, company law is codified to a much greater extent than the law relating to registered societies. Consequently, there is far greater certainty in the governance of companies, and how the format works, as compared to registered societies. Furthermore, codification of company law has afforded company members the ability to bring derivative actions and petitions for unfair prejudice to protect their rights, both of which are unavailable to the members of a registered society.

Having identified the most promising, although not perfect, ownership vehicle, this project shall now turn to consider the regulatory schemes that may be used to secure a mutual self-interest common. Regulatory schemes, unlike ownership vehicles, do not enable a community to hold title to land. Instead, they secure the common by conferring rights on the community, with title to the land remaining with a third party.

[58] Co-operative and Community Benefit Societies Act 2014, s2(1).
[59] 'Companies' pp112-113.

Chapter 6 | COMMONS REGISTRATION

The first regulatory scheme examined in this project is the commons registration scheme, contained in the Commons Act 2006 and the Commons Registration Act 1965. Commons registration, as with all the regulatory schemes considered in this project, does not transfer legal title to the land to a community. Rather, legal title remains with a third party, and the scheme recognises proprietary rights in favour of the members of a community. Consequently, Rodgers describes common land as occupying an 'ambiguous middle ground between private and communal property'.[1]

This chapter will first highlight the key features of the commons registration scheme. It will then demonstrate that the scheme does not exhibit the eight characteristics of a mutual self-interest common, making it unsuitable to secure such an arrangement. In particular, and as is replicated across all the regulatory schemes considered in this project, the scheme has an inherent concern for the public interest, precluding the exhibition of the exclusion of non-members and mutual self-interest characteristics.

I. COMMONS REGISTRATION

Historical context

Commons are not a modern concept, and common land enjoys a rich history in English law and society.[2] The origin of common land is often attributed to the manorial system of land tenure, and was the wasteland of the manor, which, whilst remaining the property of the lord of the manor, was subject to the use rights of his tenants as well as other customary rights. However, studies suggest that the concept of common land is in fact much older, and has its roots in agricultural customs and practices developed by the Celts, Romans and Anglo-Saxons.[3] Nonetheless, statutory recognition of community rights over commons did not occur until the Statute of Merton 1235 and

[1] C Rodgers et al, *Contested Common Land* (Earthscan 2011) 10.
[2] A detailed history of common land can be found in N Ubhi and B Denyer-Green, *Law of Commons and of Town and Village Greens* (Jordan Publishing Ltd 2006) chapters 1 and 2, E Cousins and R Honey, *Gadsden on Commons and Greens* (Sweet and Maxwell 2ed 2012) chapter 1, and Rodgers et al n1. Also, see the report of Royal Commission on Common Land Cmnd 462, Appendix II.
[3] See Ubhi and Denyer-Green n2 chapter 2.

the Statute of Westminster II 1285.[4] It is from that era that those who held community use rights became known as 'commoners'.

By the middle of the nineteenth century the primary use of common land was no longer agricultural, but rather for the purposes of leisure and recreation. The industrial revolution prompted a population migration to towns and cities, and common land bore the burden of providing recreational space for the influx of new residents. However, much common land had been made unavailable throughout the eighteenth and nineteenth century through the pursuit of inclosure. In response, Parliament enacted several statutes[5] (known collectively as 'the 'Victorian statutes') to protect commons by limiting inclosure. As such, the commons' problem in the nineteenth century is essentially the same as that faced by mutual self-interest commons in the twenty-first: privatisation removed resources from the common pool, generating a need to protect community entitlement to the few remaining.

Modern legal framework

In modern law, commons registration is governed by the Commons Registration Act 1965 and the Commons Act 2006 (the '1965 Act' and '2006 Act'). The 1965 Act is being incrementally replaced by the 2006 Act. At the date of this project, many of the provisions contained in the 2006 Act are not yet in force outside of the pilot areas listed in schedule 1 paragraph 1 of the Commons Registration (England) Regulations 2014, where the provisions of the 1965 Act continue to apply.

The modern statutes define common land as 'land subject to rights of common [as defined in the 1965 Act] whether those rights are exercisable at all times or only during limited periods' or 'waste land of a manor not subject to rights of common'.[6] Rights of common are rights to 'take or use some portion of that which another man's soil naturally produces.'[7] The 1965 Act defines rights of common as including

[4] Chapter 46, also known as the Commons Act 1285.
[5] See, for example, the Inclosure Acts of 1836 and 1845, the Metropolitan Commons Act 1866, the Commons Acts of 1876, 1899 and 1908 (all of which culminated in the Law of Property Act 1925, s194).
[6] Commons Registration Act 1965, s22(1).
[7] GW Cooke, *Cooke's Inclosure Acts* (V&R Stevens and Sons & Haynes 4ed 1864) 5.

> …cattlegates, or beastgates (by whatever name known) and rights of sole or several vesture or herbage or of sole or several pasture, but does not include rights held for a term of years from year to year.[8]

The common law recognises six rights of common: pasture (right to graze), piscary (right to fish), turbary (right to take turf for fuel), marl (right to take sand or gravel), pannange (right to allow pigs to forage) and estover (right to take timber for housing). Furthermore, rights of common are usually appurtenant rights, but may be appendant or exist in gross.[9]

The modern legal framework of commons registration arose out of the report of the Royal Commission on Common Land presented to Parliament in July 1958[10] (known as the 'Jennings Report' after the chairman of the Commission, Sir William Ivor Jennings). The Royal Commission took the view that 'as the last reserve of uncommitted land in England and Wales, common land ought to be preserved in the public interest',[11] and made several recommendations regarding, inter alia, the registration of both common land and rights of common, the management of that land and the granting of public access rights.

Commons Registration Act 1965

The 1965 Act was intended as the first stage in the implementation of the Royal Commission's recommendations and focused on the registration of all rights of common and the land over which they were exercisable. As such, the principal effect of the 1965 Act was to create registers of common land maintained by commons registration authorities.[12] Failure to register any rights of common and the land over which they were exercisable by 2 January 1970 resulted in the extinguishment of both

[8] Commons Registration Act 1965, s22(1).
[9] See C Rodgers, 'A New Deal for Commons? Common Resource Management and the Commons Act 2006' (2007) 9(1) *Environmental Law Review* 25, 26-27 for an explanation as to the three classifications of rights of common. In particular, appendant rights originate from customary rights held by a tenant who enjoyed feudal tenure of arable land to graze cattle on the wasteland of the manor. As the Statute of Quia Emptores 1290 abolished subinfeudation, all appendant common rights must originate in grants made before 1290, and are therefore of limited significance in the present day.
[10] Cmnd 462.
[11] Ibid [404].
[12] Commons Registration Act 1965, ss2-3.

the rights of common and the recognition of the land as common land.[13] Rodgers describes the effect of the 1965 Act as the 'capture of property rights in a fixed and static from', usurping the interaction of formal law with local custom.[14]

The 1965 Act proved deficient in many ways. First, Clarke argues that the Royal Commission and Parliament should have reformulated and modernised the substance and structure of communal land rights.[15] Failure to modernise caused the registration machinery of the 1965 Act (and subsequent 2006 Act) to be superimposed onto a mixture of 'ancient and obscure'[16] common law rules. Specifically, Clarke complains that

> we have no clear idea of the nature or extent of the rights which must be registered under the 1965 Act, nor do we know what effect, if any, registration or lack of registration has on their nature or quality of continued existence. The very act of superimposing registration machinery has inevitably had *some* effect on substantive rights, as subsequent litigation has demonstrated, but it is not at all clear what those effects are, and it is all too clear that some that have emerged were not intended.[17]

Other deficiencies in the 1965 Act included the failure to integrate the commons register with the land register (which the 2006 Act has also failed to address), the requirement that a maximum number of grazing animals must be registered where the right claimed is one of pasture,[18] and the limited provisions for modifying registrations. In particular, the registration of a maximum number of animals effectively abolished the common law principles of levancy and couchancy that had been used to determine the number of animals that may sustainably graze on a common each year.[19] It has been widely recognised that the consequence of that abolition is the registration of excessive

[13] Commons Registration Act 1965, s1(2)(b), and the Commons Registration (General) Regulations 1966, regulation 5.
[14] Rodgers et al n1 20.
[15] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 335-336.
[16] Ibid 335.
[17] Ibid 336.
[18] Commons Registration Act 1965, s15.
[19] See C Rodgers, 'Reversing the 'Tragedy' of the Commons? Sustainable Management and the Commons Act 2006' (2010) 73(3) *Modern Law Review* 461, 465-467 for explanation on the principles of levancy and couchancy, and the less popular method of calculation called 'stinting' that was also abolished as a result of section 15.

grazing rights over common land, leading to overgrazing, and arguably facilitating the tragedy of the commons.[20]

Commons Act 2006

It has been suggested that the flaws of the 1965 Act are mitigated by practices that subvert and ignore the registers, allowing local custom and expedience to hold sway.[21] Nonetheless, the Commons Act 2006, enacted following the publication of the Rural White Paper[22] in November 2000 and the Common Land Policy Statement[23] in July 2002, sought to redress many of the issues with the 1965 Act. To that end, the 2006 Act made provision for the correction of incorrect entries or omissions of common land from the register stemming from the 1965 Act, as well as for the registration of new common land and rights of common created after the commencement of the 2006 Act (albeit in limited circumstances).[24] However, the Act did not reopen the registration of rights under the 1965 Act, and rights that should not have been registered remain on the register and enforceable.

The 2006 Act is limited in application. Most of the registration provisions contained in part 1 were initially brought into force in only seven pilot areas on 1 October 2008,[25] but have since been expanded to nine areas[26] as a result of regulation 1 and schedule 1 of the Commons Registration (England) Regulations 2014.[27] It was intended that part 1 of the Act would be brought into force in three stages between 1 October 2010 and

[20] See Rodgers n19 generally and Rodgers et al n1 55-56.
[21] Rodgers et al n1 11.
[22] Department for Environment, Food and Rural Affairs, *Rural White Paper: Our Countryside: The Future – A Fair Deal for Rural England* (November 2000, Cm 4909).
[23] Department for Environment, Food and Rural Affairs, *Common Land Policy Statement* (July 2002).
[24] Any application for amendments to the register needed to have been made between 1 October 2008 and 30 September 2009, pursuant to the Commons Registration (England) Regulations 2008, regulation 39(2).
[25] Commons Registration (England) Regulations 2008, regulation 1 and schedule 1 para 1.
[26] Blackburn with Darwen Borough Council, Cornwall Council, Cumbria County Council, Devon County Council, County of Herefordshire District Council, Hertfordshire County Council, Kent County Council, Lancashire County Council and North Yorkshire County Council.
[27] The New Forest, Epping Forest and Forest of Dean are all exempt from the provisions of the Commons Act 2006 (see section 5). The New Forest was also excluded from the registration provisions under the 1965 Act, as it has its own registers of rights of common under the New Forest Act 1877-1970. Epping Forest has similar arrangements to the New Forest, and the Forest of Dean is owned by the Crown, which asserts that the land is not subject to rights of common (see Commons Act 2006 explanatory notes 49-51).

2012; however, that timetable has since been abandoned, and the provisions of the 1965 Act continue to govern where part 1 of the 2006 Act is not in force.

As well as remedying the defects of the 1965 Act, the 2006 Act continued to implement the Royal Commission's recommendations, and particularly the recommendation that commoners should be able to devise schemes for the management and improvement of their common.[28] To that end, part 2 of the 2006 Act makes provision for statutory commons councils, which are corporate bodies empowered to make binding decisions concerning the management of the common. Part 2 of the Act is only is partially in force as a result of a series of commencement orders, and is most notably in force throughout England by virtue of the Commons Act 2006 (Commencement No.5) (England) Order 2010.

Effect of registration

Part 3 of the 2006 Act, which is in force throughout England and Wales,[29] contains statutory protections for commons, and effectively replaces section 194 of the Law of Property Act 1925. In particular, part 3 contains provisions prohibiting 'restricted works' on common land without the consent of the Secretary of State, and details the process by which that consent may be obtained. Section 38(2)(a) defines restricted works as those 'which have the effect of preventing or impeding access to or over' common land. Section 38(3) particularises the erection of fencing, construction of buildings and other structures, digging of trenches and the building of embankments as meeting the definition of restricted works.[30] If restricted works are carried out without consent, any person may apply to the county court to obtain an order for the removal of the works and the restoration of the land.[31]

Finally, rights of common are legal property rights and are classed as profits à prendre. This classification has two consequences. First, the law of nuisance protects rights of

[28] Jennings Report n10 [323] and [327].
[29] Commons Act 2006 (Commencement No.2, Transitional Provisions and Savings) (Wales) Order 2012; Commons Act 2006 (Commencement No.3, Transitional Provisions and Savings) (England) Order 2007.
[30] Commons Act 2006, s38; See the Works on Common Land (Exemptions) (England) Order 2007 (SI 2007/2587) for a list of works that are exempt from the need for consent under section 38.
[31] Commons Act 2006, s41.

common in the same way as it does an easement or profit à prendre. As such, any interferences with a right of common may amount to an actionable nuisance, for which a remedy in damages or an injunction may be sought. Therefore, on the whole, the private law and statutory protections afforded to commons restrict a landowner's use of their land. Registration of land as a common is a serious subtraction from both the use and economic value that landowners may extract from their land.

Second, profits à prendre are typically considered private 'third-party' rights as they are held by an individual over the land of another. As such, arguably, rights of common, and the commons registration scheme generally, are an example of the 'class action concept of collective rights'.[32] The community of commoners comprises similarly situated individuals who hold the same rights in land and exercise these in common with each other, rather than the community itself holding the right collectively.

Other regulation

The character of common land often engages the regulatory framework of environmental and public law. For example, 48% of common land is in National Parks, 30% in an Area of Outstanding National Beauty and 88% is located within one or more of the sites that are designated for landscape or habitat protection.[33] In some instances, the environmental importance of common land can be so great as to place environmental law at the centre of the analysis of common land, especially given the focus on sustainability over property rights in the 2006 Act.[34]

The presence of public law and regulatory regimes highlights the legal pluralism of the commons. That pluralism is replicated across all the examined legal institutions used to facilitate mutual self-interest commons, as none are designed specifically for such a purpose; rather, they are creatures of private or public law that are manipulated to fulfil

[32] M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218. See 'Introduction' pp20-21.
[33] Rodgers n19 472. See also Rodgers et al n1 63. Designations include Sites of Special Scientific Interest (SSSI) under the Wildlife and Countryside Act 1981, Special Protection Areas (SPA) under the EU Birds Directive and Special Areas of Conservation (SAC) under the EC Habitats Directive.
[34] M Pieraccini, 'Sustainability and the English Commons: a Legal Pluralist Analysis' (2010) 12(1) *Environmental Law Review* 94, 113.

a function on the borderline of the divide, which is occupied by the mutual self-interest common.

Commons in the twenty-first century

As a result of the 1965 and 2006 Acts there are around 550,000 hectares of registered common land in England and Wales, equating to almost 4% of the total land area.[35] However, the Acts are criticised for focusing on the 'preservation of pre-existing common land, not the creation of new ones or the development of new forms of communal resource use.'[36]

That view is evidenced by the 2006 Act permitting the creation of new rights of common in only very limited circumstances. For example, no new rights of common may be created by prescription or reservation,[37] as was recently re-affirmed in *R (Littlejohns) v Devon County Council.*[38] Furthermore, new rights of common may only be granted over an existing common if that common was created by express grant, and may not exist in gross.[39] If a new right of common is created over land not already registered as common land, registration of that land as a common is triggered.[40] Finally, new grazing rights, or variations of existing rights, may be refused registration by a commons registration authority if it believes the land cannot sustain the right.[41]

Therefore, the first impression of the modern the commons scheme is that it may not be suitable for facilitating mutual self-interest commons where the aim is not to preserve historical commons, but to secure community entitlement to new and emerging de facto commons. It is to the correctness or otherwise of that observation that this chapter shall now turn.

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[35] Department for Environment, Food and Rural Affairs, *Guidance on the Management and Protection of Common Land in Relation to the Commons Act 2006* (April 2013). See also the Commons Act 2006 Explanatory Notes para 1 which suggests that there is a further 22,000 hectares that remain unregistered, probably as a result of this land being exempt from registration (such as the New Forest, Forest of Dean and Epping Forest).
[36] Clarke n15 333.
[37] Commons Act 2006, s6(1).
[38] [2016] EWCA Civ 446; [2015] EWHC 730 (Admin).
[39] Commons Act 2006, s6(3).
[40] Commons Act 2006, s6(5)(b).
[41] Commons Act 2006, s7(5).

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

The power to alienate land rests with the underlying legal owner who, as a result of not enjoying the status of a legal entity, is not the community. Therefore, unless the underlying owner is also a commoner, the power to alienate the land is located outside the community.[42]

Whilst registration of land as a common has wide-ranging and restricting consequences for landowners, they are not restricted in their alienation of the land; they may transfer their legal title in exactly the same way as they could absent that land being common land. However, whilst in principle title may be alienated, it is likely that the landowner would face practical difficulties in doing so. The impaired utility of the land reduces the likelihood of there being be a willing recipient of the legal title, or that they would take the land in exchange for consideration.

The alienation of title does not itself defeat the characteristic of inalienability. It will be recalled that the first limb of the inalienability characteristic requires that communal rights should not be defeated by alienations, with the effect that the land remains a communal resource. To that end, the rights of the community are proprietary; they survive the transfer, and continue to bind the land irrespective of who the landowner is and whether there is change of legal titleholder. As such, the proprietary nature of the rights ensures that the land remains subject to registered rights of common, and alienation of the legal title does not destroy the common-property regime.

Furthermore, the underlying owner's retention of alienation powers may in fact aid the protection of the resource and, consequently, the common-property regime. Whilst some common land is privately owned, often it is local authorities or public bodies that

[42] Even if a commoner is the underlying owner, there is no guarantee that they will use their powers of alienation to the benefit of the community.

hold the title to a common; these entities often have specialist skills, knowledge and resources not possessed by most private owners that may aid the management of the common, especially where the common also has a special status in environmental law, such as a SSSI, SPA, or SAC.[43] Therefore, if a private owner's land becomes registered as common land, alienation powers may facilitate the transfer of the land to an entity that is better suited to managing the burden and consequences of that registration. Curtailing alienation powers would prevent such transfers, and if the owner at the time of registration does not possess the necessary skills, knowledge and resources to preserve the common, that could result in the destruction of the resource and the common-property regime.

Severance and alienation of a discrete share

The second limb of the inalienability characteristic is concerned with preventing community members severing and alienating a discrete entitlement to the resource, especially to non-members. To that end, the inherent weakness in the commons registration scheme is that rights of common may exist as in gross rights that may be freely transferred.

The prevalence of in gross rights of common is the subject of some doubt. Historically, they were widely used.[44] For example, in gross rights of common enabled women and children, who were unable to hold land to which appurtenant rights could attach, to use the common. Similarly, poor inhabitants who did not own a dominant tenement were also occasionally permitted to use the common for grazing, and to obtain fuel.[45] Furthermore, customary rights established over common land, such as the right to recreate, hold fairs or the periodic occupation by travelling groups, may exist in gross. More recently, it has been suggested that in gross rights of common are the exception, not the norm.[46] However, empirical studies suggest that instances of in gross rights of common are actually more frequent than initially thought, even if many are customary rights inaccurately recorded as such.[47]

[43] n33.
[44] Rodgers et al n1 24.
[45] Rodgers et al n1 25.
[46] *Gadsden* n2 [2-26].
[47] Rodgers et al n1 55.

The risk is that that in gross rights may be transferred to persons outside the community as, unlike appurtenant rights of common, the transferee is not required to be geographically proximate to the resource.[48] Clearly, any such transfer undermines the second limb of the inalienability characteristic. Nonetheless, prior to the 2006 Act, such transfers were permitted. In particular, the House of Lords decision in *Bettison v Langton*[49] held that appurtenant grazing rights that were fixed in number, as opposed to being determined by the principles of levancy and couchancy, could be severed from the dominant land and alienated. The effect of *Bettison* was magnified by the operation of section 15 of the 1965 Act, which effectively abolished levancy and couchancy so that all grazing rights were fixed in number. As such, the decision in *Bettison* applied to all appurtenant grazing rights. The combined consequence of section 15 of the 1965 Act and *Bettison* was that all appurtenant grazing rights could be severed into in gross rights, which could in turn be alienated outside the community.

The 2006 Act addressed the issue of in gross rights. In particular, section 9 prevents the severance of appurtenant rights, save as for some exceptions listed in schedule 1 of the Act, by making any attempt at such a severance void.[50] In effect, section 9 reverses the decision in *Bettison.* The prohibition of severance contained in section 9(2), which applies to all rights of common and not just grazing rights, enhances the commons registration scheme's exhibition of the second limb of the inalienability characteristic. Furthermore, the importance of section 9 is implicitly acknowledged by Parliament in that it is in force generally, rather than just in the pilot areas, unlike most of the other provisions in part 1 of the Act. It was clearly deemed to be of great importance that rights of common should remain within the community, and that their transfer should only be possible when the land to which they attached was itself transferred.

The effect of section 9 is further enhanced by sections 6 and 10 of the 2006 Act, although both of these sections are in force in the pilot areas only. Section 6 generally provides that new rights of common may only be created by express grant or statute,

[48] Community members must be geographically proximate to the resource and each other, see 'Introduction' p30. Appurtenant rights require geographical proximity, see *Bailey v Stephens* (1862) 142 ER 1077, 1086 (Byles J).
[49] [2001] UKHL 24.
[50] Commons Act 2006, s9(3).

and section 6(3)(b) provides that new rights of common created by way of an express grant must be appurtenant to dominant land. Therefore, when section 6 is combined with the anti-severance clause in section 9, the effect is that all new rights of common must be appurtenant, and are unable to be severed. In turn, those rights cannot be transferred outside the community and, as such, the second limb of the inalienability characteristic is met. Furthermore, section 10 allows in gross rights that existed prior to the commencement of the 2006 Act to be attached to land, causing them to become appurtenant. Consequently, rights that were previously alienable can be made inalienable.

However, the 2006 Act does curtail the effectiveness of sections 6, 9 and 10, as section 9(2)(a) allows temporary severances made under schedule 1 of the Act. Schedule 1 paragraph 2(1)(a) permits the leasing or licensing of rights of common in accordance with any provisions or orders made by the appropriate national authority. To that end, the Commons (Severance of Rights) (England) Order 2006 permits the leasing or licensing of the right on its own for a period of no more than two years, or the leasing or licensing of the land to which the right is attached for a period of no more than two years, but with the landowner retaining the right of common for himself throughout the term of the lease or licence.[51] In Wales, the same options apply, but with a maximum duration of five years.[52] Therefore, it is possible, even if only on a temporary basis, for a commoner to transfer their entitlement to the resource. The legislation does not stipulate that the right must be transferred to someone who holds land geographically proximate to common; consequently, it is possible that rights of common may be temporarily transferred to someone outside of the community, thus limiting the exhibition of the inalienability characteristic.

Conclusion

In summary, whilst registration of land as common land restricts what a landowner may do with their land, it does not restrict alienations of the legal title. Nonetheless, the first limb of the inalienability characteristic is exhibited, as the proprietary nature of rights

[51] Commons (Severance of Rights) (England) Order 2006, regulation 2(1).
[52] Commons (Severance of Rights) (Wales) Order 2014, regulation 3(1).

of common ensures that the rights survive transfers of title, and continue to bind the new owner.

The second limb of the inalienability characteristic is, to a degree, also exhibited by the commons registration scheme under the 2006 Act. The reduction in the occurrence of freely alienable in gross rights of common aids the exhibition of the characteristic. However, the effectiveness of that reduction is limited by some key provisions of the 2006 Act being in force in the pilot areas only, as well as the allowing of temporary transfers of rights of common through leasing and licensing arrangements.

Perpetuity and intergenerational equality

The commons registration scheme has many safeguards that seek to preserve the common for future generations and promote intergenerational equality. Indeed, one of the key aims of the 2006 Act was to address the sustainability of commons and preserve them for the use of future generations.[53] Section 9 of the 2006 Act and the reversal of *Bettison* is one example of the concern for sustainability coming to the forefront in the 2006 Act, as are the provisions contained in part 2 of the Act that establish self-regulatory commons councils (discussed later in this chapter).

Sustainability

Section 6 of the 2006 Act aids the sustainability of the commons by addressing the overgrazing and exhaustion of the common. Section 6(6) provides that any application to register a new grazing right of common should be refused by the commons registration authority if it takes the view that the land is unable to sustain the exercise of the new right, or the exercise of the new right alongside any other pre-existing rights of common. Section 7(5) utilises the same test as section 6(6) for the variation of existing grazing rights. Rodgers notes that these statutory provisions are concerned with the economic sustainability of the common, as they appear to protect vegetation as a grazing resource. He also observes that the requirement that the commons registration authority consults Natural England before approving a new registration or

[53] Rodgers n19 and Pieraccini n34.

variation of grazing rights[54] means that the impact on the ecology of the common is also considered.[55] Therefore, both sections 6(6) and 7(5) could be viewed as furthering the sustainability of the commons in both the economic and environmental sense. However, it should not be overlooked that both of these provisions only apply to grazing rights, and not rights of common generally. As such, the resource is still at risk of exhaustion through the registration or variation of non-grazing rights, as these are not tested against a sustainability criterion.

Furthermore, sections 6 and 7 of the 2006 Act are in force in the pilot areas only, and do not protect common land outside these areas. Common land outside the pilot areas is protected by the sustainability provisions of the 1965 Act. Section 15(1) of the 1965 Act stipulates that

> Where a right of common consists of or includes a right, not limited by number, to graze animals or animals of any class, it shall for the purposes of registration under this Act be treated as exercisable in relation to no more animals, or animals of that class, than a definite number.

Furthermore, section 15(3) provides that

> When the registration of such a right has become final the right shall accordingly be exercisable in relation to animals not exceeding the number or numbers registered or such other numbers as Parliament may hereafter determine.

Section 15 also only applies to grazing rights. In effect, section 15(1) abolished levancy and couchancy in favour of a fixed number of animals. It could be argued that, prior to the 1965 Act, levancy and couchancy helped ensure the sustainability of the commons; only grazing rights that a common was deemed able to support in any given year were granted. Nonetheless, the Royal Commission concluded that grazing rights should be fixed, and the 1965 Act reflected this. However, the fixing of the grazing rights actually accelerated the tragedy of the commons in many cases. Often, grazing rights were inflated and commons were unable to support such a burden, causing them to become unsustainable.

[54] Commons Registration (England) Regulations 2014, regulation 35. The requirement was previously contained in the Commons Registration (England) Regulations 2014, regulation 36.
[55] Rodgers n19 480.

The sustainability effect of section 15 relies heavily on how section 15(3) is interpreted. The phrase 'animals not exceeding the number' leaves open the possibility that the number of animals could be any number up to and including that fixed, but should never exceed it. As such, it is possible that the fixed number is only an upper limit and, should circumstance and sustainability require it, the number of permitted grazing animals could be reduced from the maximum. That interpretation was favoured in *Re The Black Mountain, Dinefwr, Dyfed*[56] where it was held that the commons registration authority could reduce the grazing number, even if this prevented a grazier from grazing the full quantity of animals that he was strictly entitled to. Consequently, there is room within section 15 of the 1965 Act for a sustainability appraisal of grazing rights. Furthermore, if that appraisal takes place according to established common law principles, it is possible that the principles of levancy and couchancy have not in fact been abolished, as has been argued by the editors of *Gadsden*, the leading text on commons.[57]

However, examples of the 'maximum number' approach to section 15(3) are few and far between. The point was considered and dismissed by the House of Lords in *Bettison*, but was accepted by Etherton LJ in *Dance v Savery*.[58] In *Bettison*, Lord Scott noted that the consequence of the maximum number argument is to retain the principles of levancy and couchancy, which his Lordship was opposed on the grounds that it was clearly contrary to the intention of both the Royal Commission and Parliament.[59] On the other hand, Etherton LJ took the view that the wording of the statute is clear, and that the quantity of grazing rights registered represents only an upper limit.[60] It remains to be seen how the maximum number test and the interpretation of section 15 will continue to be received by the courts.

In summary, the sustainability focus of the 2006 Act aids the longevity of the common, and helps secure the intergenerational equality of benefit. However, the sustainability provisions are limited, as they only bite where the new rights of common that are

[56] [1985] 272/D/441; see also *Dance v Savery* [2001] EWCA Civ 1250.
[57] *Gadsden* n2 [2-67].
[58] [2001] EWCA Civ 1250 [655].
[59] [2001] UKHL 24 [60].
[60] [2001] EWCA Civ 1250 [65].

proposed, or the rights that are to be varied, are grazing rights. Furthermore, commons subject to the 1965 Act do not enjoy the same safeguards against exhaustion by grazing as those under the 2006 Act. The absence of a sustainability test in the 1965 Act generates the risk that the common will be overgrazed and exhausted, preventing future generations deriving a benefit from the resource that is equal to that enjoyed by their predecessors.

Perpetuity: extinguishing rights of common

Notwithstanding the sustainability focus of the 2006 Act, the commons registration scheme suffers an inherent flaw in the exhibition of the perpetuity and intergenerational equality characteristic. The flaw is that rights of common, and the common-property regime itself, can be extinguished through both common law and statutory methods.

i. Common law

Rights of common are a species of profit à prendre. Therefore, at common law, rights of common may be extinguished in the same way as both profits and easements. Broadly, those options are unity of seisin, implied release and express release.

Unity of seisin, also referred to as the doctrine of merger, is derived from the notion that profits and easements are 'third-party' rights held by one landowner over the land of another. If a person acquires the title to land over which he holds a profit, that profit is extinguished,[61] as it is surplus to requirement. As such, if a person who owns land to which a right of common is attached acquires the title to the common land over which that right is exercisable, the right of common will be extinguished. Whilst it is unlikely that the common-property regime as a whole will come to an end as a result of such acquisitions, as there will be many other parcels of land to which the benefit of rights of common are attached (and some rights may exist in gross), the extinguishing of rights through unity of seisin nonetheless threatens the perpetual nature of the property regime and, consequently, intergenerational equality of benefit.

[61] Co.Litt. 313a, extracted at Ubhi and Denyer-Green n2 100.

Rights of common may also be impliedly extinguished by abandonment. The Law Commission has recently reviewed the test for abandonment in its report on the law of easements, covenants and profits à prendre.[62] It is very difficult to prove, as a matter of fact, that an easement or profit has been abandoned. The threshold that must be met is high, and a right will not be deemed as abandoned if 'it might be of significant importance in the future.'[63] As such, in *Benn v Hardinge*[64] it was held that failing to use a right of way for 175 years did not raise a presumption of abandonment. Given that rights of common are often rooted in historical use of the land, and were often vital for the economic and social survival of communities, it is difficult to envisage many situations when a right of common would be deemed abandoned according to the test. In any event, destroying the common-property regime as a whole would require the abandonment of rights by all commoners, and not just a portion of them. Therefore, the threat posed by abandonment to the perpetuity and intergenerational equality of a mutual self-interest common is limited.

Finally, rights of common may be expressly extinguished in a deed executed by the right holder. The Law Commission describes express extinguishment as the most reliable way of bringing rights to an end.[65] In the context of a mutual self-interest common, all commoners would have to expressly release their rights for the regime to be destroyed. Therefore, as with unity of seisin and implied extinguishment, it is unlikely that a mutual self-interest common will be destroyed expressly. Even if one commoner chooses to expressly release their rights, preventing intergenerational equality of benefit to their successors in title, the property regime as a whole is not destroyed.

In any event, common law extinguishment has lost some importance since the 2006 Act. Section 13(3) of the 2006 Act abolishes common law extinguishment of rights of common, although the section is in force in the pilot areas only. [66] Therefore, rights of

[62] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, June 2011) [3.212]-[3.230].
[63] *Benn v Hardinge* (1993) 66 P&CR 246, 262 (Hirst LJ).
[64] Ibid.
[65] Law Commission n62 [2.66].
[66] Commons Act 2006 (Commencement No.7, Transitional Provisions and Savings) (England) Order 2014, article 3(1)(a) and 3(1)(c) and Commons Act 2006 (Commencement No.4, and Savings) (England) Order 2008, article 2(1)(a)-(b).

common outside the pilot areas remain at risk of common law extinguishment, even if that risk is limited.

ii. Commons Registration Act 1965

The 1965 Act does not contain a statutory mechanism for extinguishing rights of common per se. However, the effect of section 1(2)(b) is to render all rights of common not registered by 31 July 1970 unexercisable, which has been held to have the same effect as extinguishment.[67] Conversely, the editors of *Gadsden* are of the view that, as an extinguishing provision, section 1(2)(b) has limited effect; all it does is state the consequence of failing to register the right, and that any failure to register the right can be attributed to, and used to prove that fact of, abandonment.[68]

In the alternative, section 14 of the 1965 Act, which applies only to non-pilot areas, may be used to rectify the commons register and remove an entry. Recent cases considering section 14 all relate to town and village green rights. Therefore, section 14 will be considered in chapter seven (town and village greens), and the observations shall not be repeated here.

iii. Commons Act 2006

In contrast, the 2006 Act does provide for the extinguishment of rights of common. The provisions are in section 13 of the 2006 Act, which is in force in the pilot areas only, and also in sections 16-17, which are in force generally.

Section 13 provides for the 'surrender and extinguishment' of a right of common, as long as it is done in the prescribed form by either the right holder, or the landowner with the right holders' consent.[69] Surrenders and extinguishments take effect in law when the rights are removed from the commons register.[70] The effect of section 13 is similar to express release at common law, differing only in that it has a statutory

[67] *Central Electricity Generating Board v Clwyd CC* [1976] 1 WLR 151, 155-156 (Goff J)
[68] *Gadsden* n2 [4-19].
[69] Commons Act 2006, s13(1)(a); Commons Registration (England) Regulations 2014, schedule 4 para 7.
[70] Commons Act 2006, s13(1)(b).

footing. Therefore, the observations made above for express release apply equally to section 13, and need not be repeated again.

Section 16(1), on the other hand, provides that '[t]he owner of any land registered as common land…may apply to the appropriate national authority for the land ('the release land') to cease to be so registered.' When determining applications, the national authority (the Secretary of State in England, or the National Assembly for Wales) must have regard to:

a) The interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);

b) The interests of the neighbourhood;

c) The public interest;

d) Any other matter considered relevant.[71]

Clearly, a landowner's ability to remove land from the commons register impedes the exhibition of the perpetuity and intergenerational equality characteristic; the common-property regime can be destroyed by the deregistration of the resource and the property rights of the commoners. Section 16 does however mitigate the effect of deregistration, albeit in a limited way. Sections 16(2) and 16(3) of the 2006 Act provide that, if the deregistered land exceeds two hundred square metres, other land must be proposed to be registered as common land in exchange. Therefore, the common-property regime may survive deregistration, but the identity of the communal resource may change. However, if the deregistered land does not exceed two hundred square metres, exchange land is optional,[72] although a failure to propose exchange land will be considered when determining an application. Nonetheless, the smaller the land over which the common-property regime exists, the more susceptible it is to destruction by deregistration.

Finally, a commons registration authority has the power, under section 19 of the 2006 Act, to correct the commons register. Those corrections could take the form of

[71] Commons Act 2006, s16(6)(a)-(d).
[72] Commons Act 2006, s16(4).

removing entries on the register, with the effect of revoking the registration of rights of common and land as common land, and defeating the common-property regime. Section 19 will be considered in greater detail in chapter seven, as it applies equally to the village green and commons registration schemes.

iv. Other statutory provisions

Statutes outside of the commons registration scheme also extinguish rights of common. For example, schedule 4 of the Compulsory Purchase Act 1965 provides for the compulsory purchase of common land, the determination of compensation and the extinguishment of the commoners' rights. The schedule should be read in conjunction with section 19 of the Acquisition of Land Act 1981,[73] which provides for the extinguishment of rights of common through a compulsory purchase order.[74]

In addition, sections 203-206 of the Housing and Planning Act 2016 allow for the overriding of easements and other rights (such as profits and rights of common) in order to carry out building or maintenance works to land, with compensation for rights lost payable in accordance with section 204. Furthermore, land held by local councils may be appropriated from one use to another under section 122 of the Local Government Act 1972. As such, common land held by a local authority could be appropriated to a use other than common land, which would in turn destroy the common-property regime. However, there are some safeguards built into the statute at section 122(2) in that the land cannot exceed 250 square yards, and section 232(2) of the Town and Country Planning Act 1990 requires that the Secretary of State must give permission before common land is appropriated.

Conclusion

The commons registration scheme does not fully exhibit the perpetuity and intergenerational equality characteristic. The focus on sustainability in the 2006 Act is useful in the preservation of the common for future generations; however, its effect is

[73] Compulsory Purchase Act 1965, s1(1).
[74] Acquisition of Land Act 1981, s19(3).

diluted by the limited application of part 1, and also the limited application of the sustainability tests, which apply to grazing rights only. Furthermore, in non-pilot areas, the 1965 Act continues to govern, which does not have the same sustainability focus as the 2006 Act, and does not preserve the common for future generations to the same degree.

In addition, the ability to extinguish rights of common threatens the perpetuity of the common and intergenerational equality of benefit. In particular, statutory methods of extinguishment, especially those contained in section 16 of the 2006 Act, pose a real threat to the continued existence of the common-property regime.

Exclusion of non-members

The commons registration scheme does not exhibit the exclusion of non-members characteristic. Commoners are unable to exclude the general public from the common, for three reasons.

First, the landowner, as the legal titleholder, enjoys the general exclusory rights over the common. In contrast, the commoners may only exclude non-members if their use interfered with the commoners' rights, and may also only exclude from the areas of the resource necessary for the exercise of those rights.[75] These powers of exclusion are too limited to meet the exclusion characteristic, which requires the community to have the exclusory powers of a legal owner.

Second, whilst only commoners enjoy the right to exercise rights of common, in practice it may be difficult for the landowner to differentiate between users who are commoners and those who are not. Therefore, the landowner may not in fact exclude non-members of the community if they cannot be distinguished from community members.

Third, whilst commons registration does not itself confer rights on the public, the consequence of registration is to bring the land within the scope of many statutory

[75] Such is the consequence of understanding the community's rights as a clone of the legal titleholder's rights. See 'Introduction' pp27-28.

provisions that do.[76] For example, the Commons Act 1876, the Commons Act 1899 and the National Parks and Access to the Countryside Act 1949 provide for limited public rights of access over the common.[77] However, the two most extensive statutory provisions are section 193(1) of the Law of Property Act 1925, and section 2 of the Countryside and Rights of Way Act 2000 ('CROW'). Section 193 provides for public 'rights of access for air and exercise' over many species of common, including metropolitan commons[78] and manorial waste. CROW captures commons over which section 193 does not grant public access rights. Section 2(1) of CROW grants the public the right to enter and remain on 'access land' for the purposes of open-air recreation, provided that they do so without, inter alia, breaking or damaging any wall, fence, hedge, stile or gate. 'Access land' is defined in section 1(1) to include land shown on a map as registered common land,[79] and registered common land in any area outside Inner London for which no map relating to registered common land has been issued.[80] However, section 1(1) also provides that land will not be considered 'access land' for the purposes of CROW if it is land that is treated by section 15(1) of the Act as being accessible to the public apart from the Act, discounting all land over which the public has access rights by virtue of section 193, or any other statutory provision.

Where the public enjoy statutory use and access rights over common land, they cannot be excluded. Nonetheless, the statutes do seek to balance the rights of commoners and the public. For example, the public are only entitled to access the common for the purposes of 'air and exercise' under section 193, which does not include the right to 'draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon',[81] and for 'open-air recreation' under CROW. As such, the public are unable to engage in an unlimited use of the land, which may limit the impact of public rights on the commoners.

Furthermore, private law also limits public access rights over the common. As rights of common are a species of profit à prendre, they are protected by the law of nuisance,

[76] The Royal Commission recommended that the public should enjoy rights of access to common land, see the Jennings Report n10 131.
[77] See Ubhi and Denyer-Green n2 196-197 for a summary of the provisions.
[78] Commons subject to the Metropolitan Commons Act 1866 to 1899.
[79] Countryside and Rights of Way Act 2000, s1(1)(b).
[80] Countryside and Rights of Way Act 2000, s1(1)(c).
[81] Law of Property Act 1925, s193(1)(c).

and injunctive relief and/or a remedy in damages for interference may be granted. Therefore, the public, when exercising their statutory rights, should endeavour not to interfere with the use rights of the commoners. As such, non-members of the community are in fact prevented from engaging in some uses. Nonetheless, the overarching issue remains: the commoners have no power to exclude non-members of the community from the land entirely.

In summary, the scheme of commons registration does not exhibit the exclusion of non-members characteristic. Whilst only commoners enjoy rights of common, the community lacks the exclusory powers of an owner, and may only prevent interference with the rights of common, not the resource as a whole. Furthermore, the public have various statutory rights to access a common, and cannot be excluded.

Mutual self-interest

The commons registration scheme also does not exhibit the mutual self-interest characteristic. Mutual self-interest commons should be 'just as private to the community as private property is to the private property owner.' [82] However, commons are not governed exclusively in interests of the community, as the Royal Commission's view was that 'the way in which the commoners managed their commons was not a private matter for the commoners to decide on for themselves without reference to other interests.'[83]

The consideration of 'other interests' undermines the private nature of the resource to the community. In particular, two interests that are taken into consideration are those of the landowner and the public. As there must be an underlying titleholder of the common, it is conceivable, if not almost certain, that at some point the interests and desires of the landowner and the commoners will diverge. Where such divergence occurs, the Royal Commission took that stance that the views of the landowner should be accommodated.[84] In addition, it is clear that the commons scheme has an inherent concern for the public interest, as demonstrated by the statutory provisions conferring

[82] Clarke n15 329.
[83] Ibid 334.
[84] Ibid. See, for example, the Jennings Report n10 [323], [327] and [336].

rights to use and access the common on the public. Considering the public interest is especially problematic for a mutual self-interest common, as the public interest should only be considered where land is subject to an open-access, not limited-access, common-property regime. Inevitably, the public interest extends far beyond the interests of the community, and incorporates a wider set of concerns in the management of the common. For example, the Royal Commission considered that the public interest incorporates archaeological and ecological concerns. [85] Furthermore, Rodgers identifies the public interest in common land as the promotion of sustainable management of the wildlife and the landscape of the common, which often directly conflicts with the 'private' interests of the commoners (and also, in some cases, the landowner).[86]

A specific example of 'other interests' being considered in the commons registration scheme can be found in section 16 of the 2006 Act, which details the considerations to which the appropriate national authority should have regard when determining an application for deregistration of a common. Pursuant to section 16 of the 2006 Act, regard should be to, inter alia, the public interest, as well as the interests of commoners. [87] 'Public interest' is taken to mean the public's interest in nature conservation, the conservation of the landscape, the protection of public rights of access to any area of land and the protection of archaeological remains and features of historical interest.[88] This definition of public interest is utilised throughout the 2006 Act, and also applies to the public interest consideration when determining an application for consent for works on common land.[89] Unhelpfully, neither statutory provision indicates whether greater weight should be placed on either the interests of the commoners or the public. In the absence of guidance, it should be assumed that all are afforded equal weighting. However, by considering the public interest at all, the common is not governed exclusively in the interest of the commoners.

[85] Jennings Report n10 [219]-[223].
[86] Rodgers et al n1 106.
[87] Commons Act 2006, s16(6).
[88] Commons Act 2006, s16(8)(a)-(d).
[89] Commons Act 2006, s39(1)(c) and s39(1)(2).

In addition, the 2006 Act requires a commons council to have regard to the public interest when discharging its functions.[90] The functions of a commons council will be discussed in the context of the idiosyncratic regulation characteristic. For now, it suffices to observe that, for the purposes of the commons council provisions, 'public interest' is taken to have the same meaning as that provided for sections 16 and 39 of the 2006 Act.[91] However, Pieraccini suggests that, in contrast to sections 16 and 39, the interests of the commoners are given priority over the public interest when a commons council is discharging its functions.[92] She argues that the 2006 Act does not contain a duty to foster relations between the commoners and the public interest. Therefore, the scope of a commons council's regulation is concerned only with agriculture, not the regulation of recreational activities, meaning the commoners' rights are the primary consideration.

It is respectfully suggested that Pieraccini is wrong for two reasons, and that no special weight or priority is given to the commoners' interests. First, she assumes that rights of common are limited to grazing. Whilst that may be the case in some circumstances, it is not guaranteed that the right of common in question will always be a right of pasture, nor that the right has no recreational function. For example, rights of piscary still exist, and may now only be used for recreational purposes. Second, there is no clear indication in either the 2006 Act or the guidance that accompanies it that any consideration is afforded a greater weight than the others. Whilst there may be no duty to foster relations between the public and the commoners in the 2006 Act, the duty to consider the public interest when managing the common remains. No matter how biased a management strategy may be, in the absence of a statutory or common law direction, it can only be concluded that each consideration should be afforded an equal weighting. Commons councils may in fact pursue an application of the statute that affords the commoners greater priority, but this has no basis in law. It is regrettable that Pieraccini's assertion cannot be upheld, as to do so would make some, albeit limited, provision for the mutual self-interest characteristic in the commons registration scheme, which is currently absent.

[90] Commons Act 2006, s31(6)(b).
[91] Commons Act 2006, s31(7).
[92] Pieraccini n34 113.

In summary, the commons registration scheme does not exhibit the mutual self-interest characteristic. The obligation to consider the interests of the landowner and the public, with no special weighting given to the commoners' interest in the balance, prevents the common being managed exclusively in the mutual self-interest of the community.

Homogeneity of interest

The common law recognises six rights of common: pasture (right to graze), piscary (right to fish), turbary (right to take turf for fuel), marl (right to take sand or gravel), pannange (right to allow pigs to forage) and estover (right to take timber for housing). The editors of *Gadsden* suggest that there is a seventh right of common – the right to take animals ferae naturae. They also urge caution against assuming that all rights of common fit into one of the six (or seven) categories; the right to take any natural product, part of the soil or animal ferae naturae may be the subject matter of a right of common, and some rights overlap the classifications, which should not be thought of as being discrete.[93]

Therefore, the interests of the commoners are of a limited class. The right must either fall into one or more of the six accepted categories, or must be a right to take the natural produce of the land. Limiting rights of common in this way promotes homogeneity of interest. Whilst the rights are not completely homogeneous, as the produce that may be taken differs with each right, limiting the nature of the rights to the taking of natural produce at least limits disparity between the rights, and reduces the likelihood of there being conflict when exercising them. For example, in the case of the Norfolk samphire rights,[94] the Commons Commissioner held that five grazing rights of common recorded against the land co-existed with 117 samphire rights (which the editors of *Gadsden* argue is a right of piscary, given the water related nature of the rights).[95] Whilst the product that may be taken differs in those registrations, it is a common characteristic that what can be taken is naturally produced by the land, and that the taking of one of those products does not prejudice or conflict with the taking of the other. As such, the interests of the commoners are homogeneous in so far as each has an interest in taking

[93] *Gadsden* n2 [2-34].
[94] *Re Thornham Common, Thornham, Norfolk* (1975) 25/D/79-95.
[95] *Gadsden* n2 [2-42].

natural produce from the land, and that the rights to take such produce do not directly conflict with one another. Therefore, arguably, the homogeneity characteristic is exhibited.

It should be remembered that other rights may also exist over the common as a result of customary use of the land. However, these rights are not rights of common, and do not exist within, nor are they protected by, the commons registration scheme. Therefore, as this chapter is concerned only with the commons registration scheme, they are not considered here.

Cohesive community

Clarke argues that community cohesion provides both the means and the motive for promoting mutual self-interest.[96] Clarke probably makes this argument in anticipation of conflict between the various uses that a community may wish to make of the land, viewing community cohesion as the mechanism through which such conflicts may be resolved. However, as argued above, conflict between the interests of the commoners is likely to be limited. Therefore, in the context of commons registration, community cohesion most likely has a greater significance in relation to the pursuit of idiosyncratic regulation and the management of the land.

Community cohesion is enhanced if the pool of commoners is of a manageable size and constituted of people with similar or shared experiences. Therefore, it is desirable that the community is clearly defined, and that there is a condition of membership that ensures shared experiences. To that end, the 2006 Act contains provisions that limit both the size of the class of commoners, as well as the type of person that may be considered a commoner. In particular, sections 6 and 9 of the 2006 Act, considered earlier in this chapter, limit the geographical area from which commoners may be drawn through an appurtenance requirement. Specifically, section 6 limits who may be a commoner, as only those who hold title to land proximate to the common can enjoy new rights of common, and section 9 limits the size of the community by preventing rights of common from being severed and alienated to those who do not have a

[96] Clarke n15 329-330.

proximate landholding. However, it should be remembered that section 6 is only in force in the pilot areas, whereas section 9 is in force generally.

The assertion that the appurtenance requirement promotes community cohesion finds approval in the commons literature. For example, Rodgers notes that

> [a]n important strand in the legislation is to establish and protect *local management and control of common land* – this clearly underlies the prohibition on the severance of rights from the dominant tenement... [97] (emphasis added)

The clear objective of sections 6 and 9 is to ensure that rights of common remain local to the land over which they are exercisable. Pieraccini further argues that 'the goal of the anti-severance clause is to foster local and territorial management of the common', and that the clause prevents those who are not familiar with 'local traditions' from acquiring rights over the common.[98] Therefore, the 2006 Act pursues a mutual self-interest arrangement in which the use and control of the land is confined to those who have a geographical propinquity with the land, as well as shared experiences and understanding of community traditions.

Consequently, the commons registration scheme exhibits the community cohesion characteristic, albeit to varying degrees. Commons in the pilot areas governed by both sections 6 and 9 of the 2006 Act exhibit the characteristic to a greater degree than those outside of the pilot areas, which are only subject to section 9.

Idiosyncratic regulation

The introduction to this project established that a series of private contracts between community members was inappropriate and unworkable as a method of self-governance. As such, alternatives to such contractual obligations must be found.

Self-regulation is provided for in part 2 of the 2006 Act, which contains provisions for the establishment of commons councils. Commons councils are statutory groups that

[97] Rodgers n9 40.
[98] Pieraccini n34 95.

manage common land, and which have the power to create legally binding rules concerning its use and management.[99] Part 2 of the 2006 Act is in force throughout England.[100] There is as yet no corresponding commencement order for Wales, which is still subject to the self-regulation provisions as they stood before 2006.

Pre-2006 self-regulation (and Wales post-2006)

Self-regulation of the commons is not a new idea; commoners' attempts at self-regulation have long included regulation concerning the extent of the use rights over the resource, the time at which such use rights may be exercised, and the area of the resource over which they may be exercised. Historically, a combination of custom enforced by the manor courts, statute and by-laws allowed for the local governance of the land.[101] Following the abolition of copyhold tenure by the Law of Property Act 1922, the system of manorial rights and the importance of the manor courts faded away,[102] and commoners' associations became the primary method of self-regulation of common land.

Commoners' associations are local, often informal, bodies comprising commoners who use the land, and sometimes the landowner, especially where the landowner is a private individual who also makes use of the common. They existed in tandem with the manor courts, and often their decisions regarding the governance of the common lay behind the formal proceedings of the court. Once manor courts ceased to have effect, commoners' associations took on a more prominent role in the governance of the common, and became the sole formal management body of the resource.

The powers of commoners' associations are limited. Unlike the rules set down by a manor court, the rules of a commoners' association are not legally binding, and the effectiveness of the rules relies solely on the commoners accepting and observing them.

[99] For detailed guidance on commons councils see Natural England and Department for Environment, Food and Rural Affairs, *Land Management and Environmental Management Guidance – Set up a Commons Council* (March 2015).
[100] Commons Act 2006 (Commencement No.5) (England) Order 2010.
[101] Rodgers et al n1 40-41.
[102] Some manor courts may continue to sit and conduct customary business, but have no power to determine legal proceedings, under the Administration of Justice Act 1977.

Therefore, self-regulation using a commoners' association requires unanimity within the association, and voluntary adherence to the regulation that it creates.

Pieraccini suggests that the lack of legal personality, and the inability to set out binding regulation, threatens the decision-making powers of local communities.[103] Commons councils may provide the solution to this threat identified by Pieraccini, as a commons council is a corporate body,[104] which allows it to make legally binding decisions and enter into legal agreements in its own name on behalf of its members. Furthermore, management policies can be adopted and will be considered binding following a majority vote, with no need for unanimity, unlike a commoners' association. However, from a practical perspective, commons councils can be expensive to establish, and may also lose the informality and 'neighbourliness' associated with self-regulation at a local level.[105] Therefore the option to pursue a commoners' association remains, and it is envisaged that in most cases a voluntary association can be used,[106] unless there is internal disagreement over the management of the common.

Finally, Rodgers argues that the 1965 Act impeded the efficient management of the common. In particular, he argues that the focus on the proprietary nature of rights of common in the 1965 Act caused commoners and land managers to be bound by an 'unyielding legal schedule of rights with none of the fluidity and responsiveness of customary management.'[107] Whilst the proprietary nature of a right of common is a strength for the exhibition of the inalienability characteristic, it is also arguable that it inhibits local governance. For example, the permanence and stability of the right may inhibit regulation that governs and varies the extent and time of use, or the area of the resource over which rights may be exercised. Furthermore, the effective abolition of levancy and couchancy removes flexibility in exchange for certainty, which may in turn may prevent commoners' associations from devising rules and allocations that best reflect the social and ecological realities of the common.

[103] Pieraccini n34 107.
[104] Commons Act 2006, s26(1).
[105] Rodgers et al n1 80.
[106] Natural England and Department for Environment, Food and Rural Affairs n99.
[107] Rodgers et al n1 48.

In summary, the legal regime before 2006 (and the continuing position in Wales) provides for self-regulation of the commons. However, that self-regulation is inherently limited in its effectiveness since the demise of the manor courts, given the non-binding nature of the rules devised by a commoners' association. Furthermore, whilst it is correct and proper to classify rights of common as proprietary, doing so removes flexibility in the governance of the common.

Commons councils

Rodgers argues that the self-regulatory model of the 2006 Act, alongside the effects of sections 6 and 9, aids the pursuit of local management and control of common land.[108] The self-regulatory model is promoted in part 2 of the 2006 Act, which enables those with an interest in the common (the landowner and the commoners) to form a commons council. Members of the council are either elected or appointed by the commoners or landowner, and govern the common on their behalf. The members must apply to the Secretary of State pursuant to section 26 of the 2006 Act to establish a commons council, complying with the procedure under section 27 when doing so. In particular, section 27 requires the applicants to detail the rules of the commons council, as well as the functions that it proposes to undertake. Only once the Secretary of State makes an order in the form of a statutory instrument is a commons council actually established.[109]

An order establishing a commons council confers functions on that council. Those functions may relate to the management of the agricultural activities on the land, management of the vegetation, and management of the rights of common on the land,[110] and are further expanded at section 31(3) of the 2006 Act. Furthermore, section 32(1) adds that a commons council has the power to do anything that it considers will facilitate, or is conducive or incidental to, the carrying out of its functions. Finally, section 33 details the instances in which the commons council must seek consent from those with an interest in the land before doing anything on that land. In short, a commons council need not seek the consent of those who hold rights of common over

[108] Rodgers n9 40.
[109] Commons Act 2006, s26(4).
[110] Commons Act 2006, s31(1).

the land before doing anything on that land,[111] and also need not seek the permission of the holder of any other interest in the land if it proposes to do something that the holder of a right of common would be able to do without such permission.[112]

As a corporate body, a commons council requires a constitution and rules regarding its administration. Pursuant to section 29(1) of the 2006 Act, the Secretary of State must prescribe a standard constitution to be adopted by all commons councils, save as for when a section 26 order contains provisions inconsistent with that standard form.[113] The standard constitution was set down in the Commons Council (Standard Constitution) (England) Regulations 2010 and covers matters such as the membership of commons councils and how proceedings are to be conducted and decisions made. An interesting feature of the standard constitution is that, for a commons council to make a decision, only a majority vote is required. As such, decisions on the management of the common are binding without unanimity, generating a much greater likelihood of them arising than they would in a commoners' association. However, Rodgers[114] draws attention to the Department for Environment, Food and Rural Affairs consultation that preceded the 2006 Act, which suggests that there should be a 'double-lock' principle when decisions concerning new land use rules are made by a commons council.[115] The 'double-lock' principle would replace the majority voting system of the standard constitution and require that a prescribed majority of live graziers (recommended as 75%), determined by both their number and value of interest, is needed in order for new land use rules to be made. If utilised, the double-lock voting system may reduce the occurrence of decisions regarding new land use rules. Nonetheless, the principle should be viewed favourably: the requirement promotes consensus amongst the commoners, aiding community cohesion and homogeneity of interest.

Overall, a commons council's ability to manage the common contributes strongly to the exhibition of the idiosyncratic regulation characteristic. There are very few things

[111] Commons Act 2006, s33(2).
[112] Commons Act 2006, s33(3).
[113] Commons Act 2006, s29(2)-(3).
[114] Rodgers n9 38.
[115] Department for Environment, Food and Rural Affairs, *Consultation on Agricultural Use and Management of Common Land* (2003) 23, proposal 14.

that a commons council may not regulate, such as unlawful activities (driving motor vehicles on the common, for example), or overriding the need for the landowner's consent to exercise a right over the land other than a right of common.[116]

Commons councils: fettered self-regulation

Notwithstanding commons councils facilitating idiosyncratic regulation, the commons registration scheme does not defer completely to the rules and governance of the commoners themselves. There are many 'interpenetrations by external normative orders' in the structure of governance, which Rodgers suggests are prevalent at three levels of the governance structure: the constitutional choice level, the collective choice level and the operational choice level.[117] These interpenetrations are perhaps inevitable, given the legal pluralism of the commons, and their engagement of environmental and public law regulatory frameworks.

At the constitutional choice level, the idiosyncratic regulation of the common is inhibited by the need for the Secretary of State to approve the establishment of a commons council, sanction the rules of the commons council via a statutory instrument, and also provide a standard constitution. As such, the existence of a commons council, and the terms of its existence, are not wholly determined the commoners themselves; the commons council will only enjoy the competence afforded to it by the Secretary of State, and may not regulate matters outside of its remit.

At the collective choice level, the presence of environmental and public law regulation may inhibit idiosyncratic regulation. If the common land is designated as SSSI, SPA or SAC,[118] many decisions regarding the use of the land are not within the decision-making competence of the commoners. The result is that any self-regulation actually becomes a form of hybrid governance, as whilst the commons council adopts the scheme of regulation, an external public body, such as Natural England, often sets the objectives that the regulation seeks to achieve.[119] Furthermore, if the rules that are

[116] Natural England and Department for Environment, Food and Rural Affairs n99.
[117] Rodgers et al n1 83.
[118] n33.
[119] Rodgers et al n1 81.

adopted are formed through the land management rules under the 2006 Act, they must be approved by the Secretary of State and enacted through a statutory instrument. Other examples of state intervention were noted earlier in this chapter, such as a commons registration authority's right to refuse the registration of new grazing rights[120] or the variation of existing ones.[121]

The introduction to this project considered Bromley's argument, in which he suggests that rules originating from outside the group may destroy the resource and the common-property regime.[122] Indeed, self-governance is a cardinal feature of a mutual self-interest common. As such, it could be argued that the presence of external governance has a negative effect on the commons registration scheme's use in securing mutual self-interest commons. However, tools such as SSSI, SPA and SAC designation, and the governance imposed in association with those, are designed to preserve the resource and promote its sustainability; therefore, in this instance, external governance should not be viewed as detrimental to the resource per se, even if it is detrimental to the theoretical basis of the common-property regime.

At the operational choice level, it is actually the application of sanctions that is affected (discussed below), not idiosyncratic regulation. In short, the commons council model does not always allow for the first limb of the sanctions characteristic, mutual enforcement. For example, whilst officers of the commons council may sometimes monitor the use of the land, in instances where the common is also designated as SSSI, SPA or SAC, it will be the relevant public body that engages in the monitoring exercise. Those bodies may then initiate criminal proceedings if damage to the site's conservation interest are found to have occurred.

Finally, in addition to the interpenetrations identified by Rodgers, it should also be remembered that a commons council is bound to consider the public interest and any national policy set out by the Secretary of State when making decisions regarding the

[120] Commons Act 2006, s6(6).
[121] Commons Act 2006, s7(5).
[122] DW Bromley (ed), 'Commons, Property and Common-Property Regimes', in *Making the Commons Work: Theory, Practice and Reality* (San Francisco: Institute for Contemporary Studies 1992) 8.

management of the common.[123] As such, a commons council may find itself limited in the regulation that it may devise on the basis of these considerations.

In summary, the provision for commons councils in the 2006 Act is a step towards the exhibition of the idiosyncratic regulation characteristic. However, as a result of interpenetrations in the governance structure, the self-regulation of the common is in fact fettered, limiting the strength with which the required characteristic is exhibited.

Informal regulation

As a final note, the introduction to this project suggested that some commons may fare well if regulated through means less formal than hard command and control rules, opting instead for softer forms of regulation.[124] Of the legal institutions examined in this project, that suggestion probably has its greatest potential for application in the context of commons registration. Often, commons are grounded in historical use and a long-standing relationship between community members. Before the formal recognition of rights by the commons registration scheme, or upon their recognition and before the imposition of formal regulation (if any), it is likely that the rules regarding community use of the resource developed on an ad hoc and informal basis. Those rules may eventually crystallise into enforceable customary rights, at which point they will become legally binding an enforceable but, notably, their creation relies on a soft process of rule making and co-operation between community members.

Conclusion

Both the pre-2006 and post-2006 regimes provide for idiosyncratic self-regulation of the common. The pre-2006 regime, which continues to exist in Wales, relies primarily on voluntary commoners' associations. Those associations do not exhibit the idiosyncratic regulation characteristic as strongly as commons councils formed pursuant to the 2006 Act, which can create binding regulation regarding the use and management of the common. Nonetheless, commons councils are still limited in their

[123] Commons Act 2006, s31(6)(a)-(b).
[124] 'Introduction' pp32-33.

exhibition of the idiosyncratic regulation characteristic, as external regulation, and the consideration of public and third-party interests when making decisions regarding the management of the common, limits their powers.

Sanctions

The sanctions characteristic has two limbs: mutual enforcement, and the ultimate sanction of exclusion. Each method of regulation will be considered individually to assess whether they exhibit the sanctions characteristic.

Commoners' associations

As outlined above, commoners' associations do not produce legally enforceable rules binding the commoners to a scheme of regulation. Only if commoners voluntarily undertake to be bound by such regulation, and enshrine this commitment through a legally enforceable mechanism, such as a contract,[125] is that regulation enforceable.

Consequently, there can be no sanction for the failure to comply with rules set down by a commoners' association. Therefore, whenever a commoners' association is used to regulate the common, the commons registration scheme will not exhibit the required characteristic of sanctions for breach of idiosyncratic regulation.

Commons councils

Sometimes, the officers of the commons council, their agents and the other commoners will monitor compliance with idiosyncratic regulation. However, in some instances, public bodies will monitor compliance with rules regarding the use of the common, particularly where the land is designated as a SSSI, SPA or SAC. As such, not all regulation is subject to the mutual enforcement of the commoners. Nonetheless, where the regulation devised by a commons council is not motivated by SSSI, SPA or SAC designation, it is unlikely that public bodies would participate in monitoring

[125] The use of a series of private contracts between community members has already been disregarded as a suitable means of securing idiosyncratic regulation.

compliance. However, on the whole, commons council regulation exhibits a fettered version of the mutual enforcement limb of the sanctions characteristic.

In addition, at first glance, it seems impossible to exclude a commoner from the land. Each commoner has a proprietary right to access and use the resource and, as a matter of principle, whilst that use may be managed and regulated, it is not possible to exclude a commoner altogether. Instead, the ultimate sanction for any breach of commons council regulations are either criminal sanctions, or county court orders that secure compliance with the regulation. In particular, section 34(1) of the 2006 Act provides that any person who breaches a rule made by a commons council pursuant to its powers under section 31 is guilty of an offence. Section 34(3) further states that any person guilty of such an offence is liable on summary conviction to a fine, not exceeding level four on the standard scale. The combined effect of these sections is that, if a commoner breaches the idiosyncratic regulation devised by a commons council, they are subject to the jurisdiction of the magistrates' court, where the commons council may commence a private prosecution[126] by laying an information alleging that an offence has been committed. If the commoner in breach either pleads guilty or is found guilty at trial, they are liable to pay a fine.

In the alternative, section 34(5) enables a commons council to seek an order from the county court to secure compliance with the commons council's regulation. This civil remedy may only be sought if criminal sanctions would be an ineffectual remedy against the commoner who failed to comply with the rule.[127] It is of note that section 34(7) provides that the court is able to make any order that it sees fit when satisfying a successful application made under section 34(5). As such, the court has wide powers with regard to section 34(5) applications, and is not limited to the ordering of a mandatory injunction to secure compliance. Therefore, it is possible that a court could make an order that confiscated, suspended or deregistered a commoner's right to use the common, unless compliance with the regulation is forthcoming. If the commoner's right was confiscated, suspended or deregistered, that would have the effect of excluding them from the common, which would meet the exclusion limb of the

[126] Commons Act 2006, s34(4).
[127] Commons Act 2006, s34(6).

sanctions characteristic. Unfortunately, there are no reported examples of cases dealing with section 34(5) applications, and no guidance on the variety of civil sanctions that a court may order. Therefore, the practicality and inclination of the courts to make such an order is, as yet, untested.

Community-led sanctions

Where the common is governed by soft rules as opposed to hard command and control rules, enforcement of those rules is through community-led sanctions, such as social isolation.[128] Where the common is a traditional common and the community members have a long-standing relationship, it is conceivable that such community-led sanctions may be effective; if a community member relies on the co-operation and collegiality of other community members to enjoy the full benefit of a common that he uses for his own sustenance and economic survival, it stands to reason that he would comply with the governance rules to maintain those relations. Conversely, where the common is a modern urban common used for recreation, and its use does not provide sustenance or secure the economic survival of community members, the impetus to maintain good relations between community members may not be as great. Similarly, in new and emerging urban commons, the community relationship may not be as well established as that in traditional commons, and the community relationship not yet valued to the same degree by its participants. In a modern common, community members may be more willing to push the boundaries of the soft rules in the knowledge that the sanctions that follow, whilst not ideal, may have limited practical effect on their wellbeing or use of the common. Therefore, it is suggested that the optimal sanction for a modern urban common is one with legal force, which in turn suggests the enforcement of a hard command and control rule.

However, that does not preclude the possibility that, in some circumstances, especially where the common and the community relationship is well-established, the enforcement of soft rules through community-led sanctions may be sufficient to compel community behaviour. In those instances, the first limb of the sanctions characteristic is exhibited, with the community members responsible for the policing of the rules.

[128] 'Introduction' pp34-35.

Furthermore, a community adopting a policy of social exclusion or isolation of offending community members may also exhibit the second limb of the sanctions characteristic, but only to a limited degree. Whilst a community member may be excluded or isolated from the community as a social construct, it does not follow that they are, or can be, excluded from the resource itself. The community, as there is no legal force behind the sanction, may be deprived of the power necessary to remove a community member's entitlement to use the resource. Therefore, whilst the community member may become socially isolated, their entitlement to use the communal resource may continue, undermining the exhibition of the exclusion limb of the sanctions characteristic.

External sanctions

Sanctions external to a scheme of idiosyncratic regulation may also help control and moderate the behaviour of commoners. For example, the law of private nuisance and the criminal offences contained in the Victorian statutes may discourage behaviour that interferes with another commoner's use of the land. These sanctions apply to both the village green and commons schemes, and will be considered in detail in chapter seven. For now, it suffices to observe that, as they are not sanctions for the breach of idiosyncratic regulation, which is what the characteristic is concerned with, external sanctions do not exhibit the sanctions characteristic.

Conclusion

Whilst the pre and post-2006 regimes provide for idiosyncratic regulation, only the post-2006 regime of statutory commons councils exhibits the sanctions characteristic. However, the limits of those sanctions are yet to be tested, and it is unclear whether the ultimate sanction of exclusion can be achieved. Furthermore, mutual enforcement of commons council regulation may, on occasion, be fettered, as a result of the involvement of public bodies when devising that regulation.

III. CONCLUSION

Commons registration, as with all the regulatory schemes examined in this project, does not transfer legal title to the resource to the community. Instead, registration confers upon community members (known as 'commoners') rights to access, use and derive a benefit from the resource. Historically that benefit would have been associated with agricultural activities, although modern commons are more frequently used for recreation.

On the whole, the commons registration scheme does not exhibit the eight characteristics of a mutual self-interest common. For example, the perpetuity characteristic is not exhibited because of the statutory and common law mechanisms that may be used to extinguish rights of common and deregister the land. Similarly, intergenerational equality of benefit is not exhibited; whilst the 2006 Act has a strong focus on the sustainability of commons, that concern is mostly limited to the context of grazing rights only. As such, it is possible to exhaust the common through other means, leaving it unavailable for future community members. In any event, the sustainability provisions of the 2006 Act are not in force generally, leaving some commons governed by the 1965 and vulnerable to over-exploitation. Furthermore, where a common is not subject to part 2 of the 2006 Act, which provides for the establishment of commons councils, neither the idiosyncratic regulation or sanctions characteristics are exhibited.

Additionally, commons registration also fails to exhibit the exclusion of non-members and mutual self-interest characteristics. The failure to exhibit those characteristics is attributable to the fact that the commons registration scheme does not transfer legal title to the resource to the community; the resource is not private to the community, its regulation has an inherent concern for the public interest, and various statutes grant the public rights over commons. Indeed, none of the regulatory mechanisms examined in this project transfer title to the resource and, as such, it is foreseeable that all will fail to exhibit the exclusion and mutual self-interest characteristics. To assess whether that assertion is true, this project shall now turn to considering an alternative regulatory scheme that may be used to secure a mutual self-interest common: the town and village green regime.

Chapter 7 | TOWN AND VILLAGE GREENS

Town and village green ('TVG') registration, governed by the Commons Act 2006, is the second regulatory scheme examined in this project. As with the commons registration scheme and the planning regime, the TVG regime does not transfer legal title to the resource to the community, but instead confers upon a community rights over land, the legal title to which is held by a third party.

This chapter will first highlight the key features of the TVG regime. It will then demonstrate that the regime does not exhibit the eight characteristics of a mutual self-interest common, making it unsuitable to secure such an arrangement. In particular, the TVG regime, in common with the other regulatory schemes, does not exhibit the exclusion of non-members and mutual self-interest characteristics. Those characteristics are precluded by the inherent concern for the public interest in the TVG regime, and the fact that the community does not hold the legal title to the resource.

I. TOWN AND VILLAGE GREENS

Historical background

TVGs are rooted in customary law, and the need for open spaces in villages in which both leisure and non-leisure activities may be conducted.[1] Examples of customary rights that have been upheld throughout TVG history include the right to play cricket,[2] maypole dancing[3] and horse racing,[4] although the early cases do not expressly use the term 'village green'.[5] As with commons, a series of 'Victorian statutes'[6] were enacted in the nineteenth century to protect TVGs in response to the concern that land was

[1] A detailed history of TVGs can be found in N Ubhi and B Denyer-Green, *Law of Commons and of Town and Village Greens* (Jordan Publishing Ltd 2006) chapter 9 and E Cousins and R Honey, *Gadsden on Commons and Greens* (Sweet and Maxwell 2ed 2012) Chapter 13.
[2] *Fitch v Rawling* (1795) 126 ER 614.
[3] *Hall v Nottingham* (1875) 1 Ex D 1.
[4] *Mounsey v Ismay* (1865) 158 ER 1077.
[5] The term is not expressly used until it appears in the Inclosure Act 1845, s15, although the statute fails to define it. Lord Hoffmann has since suggested that the term in the 1845 Act would have been interpreted as meaning any land over which the local inhabitants enjoyed customary rights of recreation, see *Oxfordshire County Council v Oxford City Council and Another* [2006] UKHL 25 [7].
[6] Inclosure Act 1845, Inclosure Act 1857 and the Commons Act 1876.

being privatised and removed from the common pool, at the expense of growing populations in towns and cities. The protection afforded by these statutes still protects TVGs in the present day.

Twentieth century TVGs

As with commons registration, the modern legal framework governing TVGs arose out of the report of the Royal Commission on Common Land presented to Parliament in July 1958.[7] The Royal Commission produced the first attempt at defining a TVG[8] and, on the whole, took the view that village greens found 'the hand of the twentieth century lying heavy on them'[9] and that they 'ought to be preserved in the public interest'.[10] The report made several recommendations with regard to TVGs including, most notably, recommendations regarding their registration.[11] It is to those recommendations that the modern scheme of registration can be traced.

Commons Registration Act 1965

The recommendations of the Royal Commission were largely adopted by Parliament in the Commons Registration Act 1965 (the '1965 Act'). Section 22(1) of the Act, as amended by section 98 of the Countryside and Rights of way Act 2000, contained the first statutory definition of a TVG

> …land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of the locality have a customary right to indulge in lawful sports and pastimes, or which falls within subsection (1A) of this section.

Furthermore, section 22(1A) provided that land could be registered as a TVG if

[7] Cmnd 462 (the 'Jennings Report'). Throughout the report the term 'common' is used to refer to both commons and TVGs collectively.
[8] Ibid [403].
[9] Ibid [19].
[10] Ibid [404].
[11] For a summary of these recommendations see page 135 of the Jennings Report n7 and *Gadsden* n1 [13-09].

> It is land on which for not less than twenty years a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged in lawful sports and pastimes as of right, and either –
>
> a) continue to do so, or
> b) have ceased to do so for not more than such period as may be prescribed, or determined in accordance with prescribed provisions.

Consequently, the 1965 Act made provision for three types of TVG, labelled as class A, class B and class C greens.[12] Class A greens were those that arose by allotment, class B arose by custom and class C refers to those that arise by engaging in lawful sports and pastimes, as of right, for a period of at least 20 years. The definition of a class C green is strikingly similar to that of private easements arising by prescription, and much of the case law regarding prescriptive easements has been used to flesh out TVG law.[13]

Notably, the cut-off date for the registration of class A and B greens was in 1970,[14] after which it was possible to register class C greens only.[15] Therefore, all new greens that come into being after 1970, of which there have been many, are class C.

Modern legal framework

The registration provisions for TVGs are now largely found in the Commons Act 2006 (the '2006 Act'). As noted in the previous chapter, most of part 1 of the 2006 Act, which contains the registration provisions, is in force in pilot areas only.[16] As such, outside of the pilot areas, the power to register a TVG is found in section 1 of the 1965 Act, and not within the 2006 Act.

[12] This classification was adopted in *R v Suffolk County Council Ex p Steed* (1996) 71 P&CR 463 by Carnwath J.
[13] Village green law is described as being 'traceable' to prescription by Patten LJ in *Taylor v Betterment Properties (Weymouth) Ltd* [2012] EWCA Civ 250 [36].
[14] Commons Registration Act 1965, s1(2), and the Commons Registration (General) Regulations 1966, regulation 5.
[15] Commons Registration (New Land) Regulations 1969, regulation 13(b) made it possible for the TVG register to be amended where 'any land *becomes*… a town or village green' (emphasis added).
[16] 'Commons Registration' p168 and fns 25 and 26.

Nonetheless, irrespective of whether land is located in a pilot area or otherwise, the test for registering land as a TVG is contained in section 15 of the 2006 Act, which requires that

> …a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years

and either

a) they continue to do so;[17]
b) they ceased to do so before the time of the application, but after the commencement of section 15, and the application is made within one year of the cessation of that use;[18]
c) they ceased to do so before the commencement of section 15 and the application is made within five years of the cessation of that use[19] (subject to the exceptions listed in section 15(5)).

As these so-called class C greens are underpinned by the principles of prescription, 'as of right' is taken to mean the tripartite test of *nec vi, nec clam* and *nec precario*: that the use must be without force, without stealth and without the licence of the landowner.[20] The rationale behind this test was explained by Lord Hoffmann in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* as being that every legal system needs rules of prescription that protect long established de-facto enjoyment of land.[21] Each of these three factors gives the landowner the opportunity to object to the use by the local inhabitants; if they do not object, they are deemed to have acquiesced in the use of the land.

[17] Commons Act 2006, s15(2).
[18] Commons Act 2006, s15(3).
[19] Commons Act 2006, s15(4).
[20] *R v Oxfordshire County Council, Ex p Sunningwell Parish Council* [2000] 1 AC 335, 350H (Lord Hoffmann).
[21] [2000] 1 AC 335, 349D.

Effect of TVG registration

TVG registration confers 'rights of recreation' on the local inhabitants in whose favour the land has been registered.[22] Correlatively, the landowner is subject to an obligation not to interfere with those use rights, and is at risk of facing criminal[23] or civil[24] sanctions if he did so. Two points of note arise with regard to TVG rights.

First, the TVG regime arguably complies with the requirement that the community must hold any communal rights for the collective benefit, with individual members able to invoke those rights. As such, the TVG regime is more than an example of the 'class action concept of collective rights'.[25] That argument is made because rights of recreation are conferred upon a class of persons when land is registered as a TVG (the inhabitants of a locality or neighbourhood within a locality), yet an individual inhabitant may invoke those collective rights if their use of the land is interfered with, without needing to join the other inhabitants in that action and invoke the right collectively.

Second, it is arguable that the rights conferred by registration are proprietary; they have a 'degree of permanence and stability'[26] that is not enjoyed by personal rights, as they survive transfers of the land and can be enforced against all transferees of the legal title. However, the proprietary status of TVG rights is yet to be confirmed by the courts. The argument was made recently and appeared to be accepted in submissions as 'trite' by the Supreme Court in *R (NHS Property Services Ltd) v Surrey County Council* and *R (Lancashire County Council v Secretary of State for the Environment, Food and Rural Affairs*[27] (conjoined appeals). However, the point is not dealt with in the written judgment.

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[22] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) [80] (HHJ Waksmann QC).
[23] Inclosure Act 1857 and the Commons Act 1876.
[24] It is implied by Lightman J in *Oxfordshire County Council v Oxford City Council and Another* [2004] EWHC Ch 253 at [6] that the local inhabitants could seek an injunction to restrain any interference with the rights conferred upon them by TVG registration.
[25] M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218. See 'Introduction' pp20-21.
[26] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1248 (Lord Wilberforce).
[27] [2019] UKSC 58.

Practically, the rights conferred by TVG registration often sterilise the development potential of land. Indeed, the restricting effect of a landowner's duty not to interfere with the inhabitants' use rights has caused Goymour to suggest that TVG registration is tantamount to adverse possession.[28] However, Lord Hoffmann does not agree with that assertion. Instead, his Lordship takes the view that there are two significant differences between the doctrine of adverse possession and TVG registration.[29] First, TVG registration does not deprive the landowner of his title in the same way as a successful adverse possession would. Second, adverse possession generally benefits an individual possessor, whereas TVG registration benefits a section of the public.

Irrespective, the burden suffered by landowners of TVGs is huge; TVG land would, for most purchasers, be an unattractive prospect as the economic and amenity value of the land is diminished.[30] Furthermore, the burden is not limited to the effect of registration; the financial burden of objecting to an application for registration must be borne by the landowner, and the costs and inconvenience of doing so can be great.[31]

TVGs in the twenty-first century

The Open Spaces Society estimate that there are now about 3650 registered village greens in England and 220 in Wales, covering 8150 and 620 acres respectively.[32] However, there is a growing perception that TVG registration is being used simply as a means to thwart development.[33] To that end, Lord Walker has noted that TVG registration is a means by which campaign groups can by-pass normal development controls, and that many TVG registrations stretch the TVG concept to the limits of what Parliament intended.[34] Latterly, his Lordship has also acknowledged the

[28] A Goymour, 'Village Greens and the Fight Against Development' (2007) 18(1) *King's Law Journal* 155.
[29] [2006] UKHL 25 [86]-[90].
[30] For examples see *Paddico 267 Ltd v Kirklees Metropolitan Council* and *Betterment Properties (Weymouth) Ltd v Dorset County Council and Another* [2014] UKSC 7 (conjoined appeals).
[31] Department for Environment, Food and Rural Affairs, *Consultation on the Registration of New Town or Village Greens* (July 2011) [1.3.2].
[32] http://www.oss.org.uk/what-we-do/village-greens/ (last accessed 3 June 2019).
[33] See, for example, A Penfold, *Review of Non-Planning Consents* (July 2010) para 4.25. The perception is by no means unanimous, as can be seen from the responses to the Department for Environment, Food and Rural Affairs, *Town and village green consultation: summary of responses* (November 2012).
[34] *R (Beresford) v Sunderland City Council* [2003] UKHL 60 [90].

perception that TVG registration has become 'a weapon of guerrilla warfare against development of open land.'[35] Furthermore, a study commissioned by the Department for Environment, Food and Rural Affairs has suggested that 'in just under half of cases the motivation for TVG registration was driven by, or influenced by, proposals for development in the Local Plan [36] or planning applications submitted for the development of the TVG site'.[37]

In response to the changing perception of TVG registration, recent legislative and case law developments have made it harder to register land as a TVG. The most important statutory intervention is the Growth and Infrastructure Act 2013, which inserted section 15C into the 2006 Act. Section 15C provides that the right to apply for registration under section 15 of the 2006 Act ceases if one of the 'trigger events' listed in schedule 1A of the 2006 Act has occurred. Those trigger events are all linked to proposals for development, whether by an application for planning permission, or designation of land in a local or neighbourhood plan. Examples of case law developments limiting TVG registration can be found in *R (Barkas) v North Yorkshire County Council*[38] and *R (Newhaven Port and Properties Ltd) v East Sussex CC.*[39] In *Barkas* it was held that use of land would not be qualifying for the purposes of TVG registration if the local inhabitants were making use of it pursuant to a statutory right,[40] as such use would be considered 'by right', not as of right. Furthermore, in *Newhaven* it was held that the 2006 Act does not enable TVG registration where the use rights that registration would confer upon the local inhabitants would be incompatible with any statutory function of the land or landowner. For example, in *Newhaven* it was considered that the rights of local inhabitants to use the foreshore would inhibit the port authority's statutory functions in relation to the working harbour.

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[35] *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11 [48] (Lord Walker).
[36] See 'Planning Law' pp235-239 for an explanation of a 'local plan'.
[37] Countryside and Community Research Institute and Asken Ltd, *Study of Determined Town and Village Green Applications* (Report to the Department for Environment, Food and Rural Affairs, project code NR0139) (October 2009) para 7.10.
[38] [2014] UKSC 31.
[39] [2015] UKSC 7.
[40] The case concerned the use of land pursuant to the Housing Act 1985, s12. The ratio would also apply to land used pursuant to the Open Spaces Act 1906, s10.

Nonetheless, despite the increasing barriers to registration, the TVG regime is one of the few regulatory schemes in English law that seeks to protect and secure community use rights. Therefore, it is possible that the regime could be used to secure a mutual self-interest common.

The use of the TVG regime

Before turning to an assessment of the extent to which the TVG regime exhibits the eight required characteristics, the mutual self-interest commons that may be secured by the TVG regime, and the relationship between some concepts, should be considered.

TVG land

Contrary to first appearances and the image of a village green, the TVG regime is not limited to protecting open green spaces. For example, in *Newhaven* the land sought to be registered as a TVG was the foreshore of a tidal beach. The inspector conducting the public inquiry recommended registration and, in the judicial review, Ouseley J held that a beach 'is not excluded from registration because it is not a traditional green or grassy. Nor is it excluded because it is wholly covered in water for part of the day and wholly uncovered for only a very short period of the day'.[41] Whilst the case endured two further appeals, neither the Court of Appeal or Supreme Court interfered with that finding. As such, it is now settled and accepted that a village green does not have to be open green space.[42]

Therefore, the TVG regime can be used to secure a mutual self-interest common even where the communal resource does not conform to the traditional image of a village green. For example, if a community makes use of a paved or hard-standing area for the purposes of recreation the physical characteristics of that land will not preclude the possibility that it may be registered as a TVG, as the law is more concerned with the characteristics of the use.[43] Consequently, it appears that the TVG regime has some potential for securing the modern urban commons with which this project is concerned,

[41] [2012] EWHC 647 [39].
[42] Examples post-dating *Newhaven* include *TW Logistics v Essex County Council* [2017] EWHC 185 (Ch); [2018] EWCA Civ 172. Whilst there is an outstanding appeal to the Supreme Court, the grounds of appeal do not include whether a village green must be an open green space.
[43] *R (Newhaven Port and Properties Ltd) v East Sussex CC* [2012] EWHC 647 [31] (Ouseley J).

and which may not necessarily share the same physical attributes of the traditional mutual self-interest common.

Concepts in the TVG regime

The TVG regime relies on its own concepts that are not utilised in other legal frameworks. Most notable of those concepts are 'locality' and 'neighbourhood within a locality'. Whilst these concepts seem unique to the TVG regime, there is a significant overlap between the inhabitants of a locality or neighbourhood, and the concept of a community as set out in the introduction to this project.[44]

The inhabitants of a locality or neighbourhood within a locality are the community whose use gives rise to TVG registration, and in whose favour future use is secured. As is outlined later in this chapter,[45] 'locality' overlaps strongly with the objective limb of the community definition in that it limits the geographical area from which the community members (ie. the inhabitants) may be drawn. Further, 'neighbourhood' overlaps with the subjective limb of the community definition, with the concept relying on the subjective understanding of the inhabitants.[46]

Therefore, this project equates the inhabitants of a locality or neighbourhood within a locality to the concept of a community in the wider commons scholarship. It is this equation that enables the application of the TVG regime to the task of securing mutual self-interest commons. Whether it is sufficient for the inhabitants to be drawn from simply a locality as opposed to a neighbourhood within a locality will be assessed in due course in the context of the relevant characteristics.

[44] 'Introduction' pp17-21.
[45] pp222-224.
[46] pp224-226.

II. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

TVG registration does not transfer title to the land, but instead confers enforceable rights of recreation upon the local inhabitants. Therefore, there is still an underlying titleholder (whether an individual, local authority or ownership vehicle) in whom the power to alienate the land is vested. Consequently, unless the underlying owner is a local inhabitant, the power to alienate the land is located outside the community.[47]

As with commons registration, TVG registration restricts how a landowner may use their land as they are duty bound not to interfere with use by the local inhabitants, but it does not restrict their alienation powers. As such, a landowner is free to transfer the legal title to their land in the same way they could absent that land being a TVG. Nonetheless, it is likely that the landowner would face practical difficulties; the impaired utility of the land reduces the likelihood of there being be a willing recipient of the legal title, or that they would take the land in exchange for consideration.

Alienation of legal title to a TVG will not defeat the inalienability characteristic, which requires only that communal rights should not be defeated by alienations, not that title to the resource should be inalienable per se. To that end, transferring the legal title to a TVG does not defeat TVG registration. Once registered as a TVG, the land continues to enjoy TVG status, and the rights conferred upon local inhabitants survive any transfer of the legal title, binding any transferee. As such, alienations of the legal title do not defeat communal rights, and the first limb of the inalienability characteristic is exhibited.

[47] Even if a local inhabitant is the underlying owner, there is no guarantee that they will use their powers of alienation for the benefit of the community.

Severance and alienation of a discrete share

TVG rights are not a tradeable commodity, and cannot be alienated. Only those who inhabit the relevant locality or neighbourhood within a locality may enjoy the rights of recreation conferred by registration.[48] Therefore, for an individual to benefit from TVG rights, they must join the community by becoming an inhabitant of the relevant locality or neighbourhood within a locality; TVG rights cannot be acquired as a result of a transfer of the right from one individual to another.[49] As such, TVG rights cannot be alienated outside of the community, which is the primary concern of the second limb of the inalienability characteristic.

Conclusion

On the whole, the TVG regime exhibits the inalienability characteristic. TVG rights survive transfers of the land over which those rights may be exercised, and may not be severed by individual members of the community and alienated.

Perpetuity and intergenerational equality

TVG registration is perpetual in that, once registered, land will continue to hold its TVG status, and TVG rights remain enforceable, even if the landowner transfers the legal title to the land. Consequently, the TVG is available for future generations, and intergenerational equality of benefit is exhibited. However, as with commons registration, TVG registration, and the rights that it confers, can be defeated.

Commons Registration Act 1965

Where a TVG is located outside of the pilot areas, section 14 of the 1965 Act may still be used to defeat TVG rights. Section 14 enables applications to be made to the High Court for the rectification of the TVG and commons register, and can be used to remove

[48] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) [80] (HHJ Waksmann QC).
[49] The only transfer that may 'include' TVG rights is the transfer of land within the locality or neighbourhood. However, that transfer only serves to bring the transferee within the definition of an 'inhabitant', and TVG rights are not appurtenant to the transferred land.

an entry if the court deems it just to rectify the register and the registration is tainted by fraud,[50] or if

> the register has been amended in pursuance of section 13 [of the 1965 Act] and it appears to the court that no amendment or a different amendment ought to have been made and that the error cannot be corrected in pursuance of regulations made under this Act.[51]

Whilst section 14 expressly references section 13 of the 1965 Act, and has been used to challenge registrations made pursuant to the 1965 Act,[52] it may also be used to rectify registrations made pursuant to section 15 of the 2006 Act.[53] Therefore, if a landowner can raise a technical argument as to why the TVG registration should not have occurred, the mutual self-interest common may lose its TVG protection pursuant to section 14 of the 1965 Act. As such, section 14 inhibits the exhibition of the perpetuity and intergenerational equality characteristic.

Commons Act 2006

Section 16 of the 2006 Act allows a landowner whose land is registered as a TVG to apply to the appropriate national authority (the Secretary of State in England, or the National Assembly for Wales) for the land to cease to be so registered.[54] Applications may be made without a material change in circumstances, and can be made notwithstanding the inhabitants continued use of the land, and the persistence of the conditions that gave rise to registration. Therefore, in theory, landowners aggrieved at the registration of their land as a TVG, and who were unsuccessful in challenging the decision to register the land through the mechanism of judicial review, may make a deregistration application as a second way of trying to defeat the registration. If the land is deregistered, the local inhabitants no longer enjoy the rights conferred by TVG

[50] Commons Registration Act 1965, s14(a).
[51] Commons Registration Act 1965, s14(b).
[52] *Betterment Properties (Weymouth) Ltd v Dorset County Council and Another* and *Paddico 267 Ltd v Kirklees Metropolitan Council* [2014] UKSC 7.
[53] *TW Logistics v Essex County Council* [2017] EWHC 185 (Ch); [2018] EWCA Civ 172. Although, on the evidence provided, the section 14 application was dismissed.
[54] Commons Act 2006, s16(1). Section 16 also applies to commons governed by part 1 of the 2006 Act.

registration; the common-property regime is extinguished, leaving future generations unable to use the resource in the same manner as their predecessors.

However, the common-property regime may in fact survive the deregistration of the land itself. Sections 16(2) and 16(3) of the 2006 Act provide that if the deregistered land exceeds two hundred square metres, other land must be proposed to be registered as a TVG in exchange. Therefore, the identity of the communal resource may change, but the property regime itself survives. However, if the deregistered land does not exceed two hundred square metres, exchange land is optional,[55] although a failure to propose exchange land will be considered when determining an application. Furthermore, it is questionable whether exchange land is really within the spirit of a common-property regime, as the academic literature clearly envisages that intergenerational equality relates to an equality of benefit over the same resource.[56]

In addition, section 19 of the 2006 Act, which is in force throughout England and Wales, confers upon a commons registration authority the power to correct the TVG register. The correction powers are much wider than those provided for under section 14 of the 1965 Act, [57] apply to the correction of mistakes made before its commencement,[58] and could be used to remove an entry from the register.

However, section 19 might not be as useful to landowners seeking to remove their land from the TVG register as section 14. Section 19 does not allow for a direct application to be made to the High Court, and a commons registration authority's decision made pursuant to section 19 would need to be challenged through the judicial review process. Furthermore, few section 19 challenges have occurred, and those that have occurred are mostly concerned with challenging a decision not to register land as a TVG, as opposed to challenging successful registrations. Therefore, it remains to be seen how useful section 19 is as a tool for securing deregistration and defeating TVG rights.

[55] Commons Act 2006, s16(4).
[56] See, in particular, T Eggertsson, 'Open Access Versus Common Property' in TL Anderson and FS McChesney (eds), *Property Rights: Cooperation, Conflict and Law* (Princeton University Press 2003).
[57] *Naylor v Essex County Council* [2014] EWHC 90 (Admin) [97] (HHJ Thornton QC).
[58] Commons Act 2006, s19(3).

Other statutory provisions

Chapter six noted a variety of statutory provisions existing outside of the commons registration scheme that could be used to override the rights of commoners.[59] Those statutory provisions apply equally to TVG registration, and the observations shall not be repeated here.

There are case law examples of statutory provisions being used to override TVG rights. For example, in *BDW Trading Ltd (t/a Barratt Homes) v Spooner*[60] a local authority had appropriated land for planning purposes under section 122 of the Local Government Act 1972, disposed of it under section 233 of the Town and Country Planning Act 1990, and subsequent development had occurred pursuant to section 241 of the Town and Country Planning Act 1990. It was held that the provisions of the Town and Country Planning Act 1990 prevailed over the 2006 Act, and the recreational use of the local inhabitants could not be formalised and protected by TVG registration. As such, *BDW Trading Ltd* is a good example of how de facto common-property arrangements are vulnerable, and how TVG registration may not be able to protect them in perpetuity and secure intergenerational equality of benefit.

Conclusion

The TVG regime does not exhibit the perpetuity and intergenerational equality characteristic. Provisions exist within both the 1965 and 2006 Act that allow for the deregistration of TVGs and the revocation of the rights conferred by registration, albeit with some limited provision for exchange land in the 2006 Act. Furthermore, statutory provisions outside the TVG regime may also be used to defeat TVG rights, preventing future generations benefitting from the land in the same way as their predecessors.

Exclusion of non-members

The TVG regime does not exhibit the exclusion of non-members characteristic. TVG registration, like commons registration, does not transfer the legal title to the land to

[59] 'Commons Registration' p183.
[60] [2011] EWHC 1486 (QB).

the community. Therefore, it is the underlying titleholder who enjoys exclusory rights and powers over the TVG, not the community.

Nonetheless, only the inhabitants of the qualifying locality or neighbourhood enjoy the rights conferred by TVG registration, and no such rights are conferred on the public.[61] Consequently, Lightman J has suggested that the local inhabitants may seek an injunction to restrain any interference with their use rights.[62] The likely cause of action for any interference with TVG rights is private nuisance.[63] However, the local inhabitants are only able to exclude others in so far as they interfere with their use rights, and may only exclude from the land as necessary for the exercise of those rights, as opposed to excluding from the land generally. These powers of exclusion are too limited to meet the exclusion characteristic, which requires the community to have the full exclusory powers of a legal owner.

Furthermore, in practice it may be difficult for the landowner to differentiate between users who are entitled to TVG rights, and those who are not,[64] and they may opt not exclude any users of the land. Therefore, the practical effect of TVG registration is to make the land available for public recreation. As such, it is arguable that TVG registration secures an open-access common, even though the public have no right to use the land per se.

It is of note that, unlike commons registration, registering land as a TVG does not bring the land within the scope of statutory provisions granting the public rights of access. Therefore, the sole barrier to the TVG regime exhibiting the exclusion of non-members characteristic is the absence of the exclusory powers incident to legal titleholding. Nonetheless, the barrier is insurmountable, and the exclusory powers of the community are too limited to exhibit the exclusion of non-members characteristic.

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[61] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) [80] (HHJ Waksmann QC).
[62] *Oxfordshire County Council v Oxford City Council and Another* [2004] Ch 253 [6].
[63] This assertion is made given the similarities between TVG rights and private easements. It should be remembered that interference with a TVG may attract criminal sanctions as a result of the application of the Victorian statutes.
[64] *R (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust) v Oxfordshire County Council* [2010] EWHC 530 (Admin) [80] (HHJ Waksmann QC).

Mutual self-interest

The mutual self-interest characteristic requires the resource to be 'just as private to the community as private property is to the private property owner.' [65] As TVG registration only confers rights on the local inhabitants, it initially appears that the characteristic is met. However, the mutual self-interest characteristic is in fact not exhibited, for two reasons.

First, as noted above, the practical effect of TVG registration is to make the land available for public recreation. Whilst the public enjoy no rights over the land, a landowner may struggle to differentiate between users who are local inhabitants and those who are not, and users from outside the community may not be excluded. That public use prevents the resource being private to the community, and causes the TVG regime to display characteristics of an open-access common.

Second, the TVG regime shares with the commons registration scheme an inbuilt concern for the public interest. Throughout its report, the Royal Commission did not distinguish between commons and TVGs, using the term 'commons' to encompass both. Therefore, recommendations regarding commons and the public interest made by the Royal Commission applied equally to TVGs. Those recommendations included the view that the management of commons was not to be decided on by the commoners without reference to other interests,[66] particularly those of the landowner and the public, and that common land ought to be preserved in the 'public interest'.[67] Similarly, the legislation that arose from the Royal Commission's report also does not distinguish between TVGs and commons with regard to the public interest. For example, the deregistration provisions in section 16 of the 2006 Act apply to both commons and TVGs, with section 16(6)(c) stipulating that regard should be had to the public interest when applications to deregister a common or TVG are determined. The operation of section 16 was considered both earlier in this chapter and in chapter six,[68] and those observations will not be repeated here.

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[65] A Clarke 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 329.
[66] 'Commons Registration' pp186-189.
[67] Jennings Report n7 [404].
[68] 'Commons Registration' p182 and pp187-188.

It is especially peculiar that the legislation does not distinguish between commons and TVGs with regard to the public interest. Unlike the consequences of commons registration, TVG registration confers no rights on the public. Whilst it is unhelpful for the exhibition of the mutual self-interest characteristic, considering the public interest in the context of commons is at least justifiable; the consequence of commons registration is to bring land within the scope of statutory provisions that grant public rights of access, and it is natural that those rights should be considered when managing the common. However, TVG registration neither confers rights on the public, nor does it bring the land within the scope of statutory provisions that do. As such, the public have no rights over TVG land at all, and considering the public interest is unnecessary and non-sensical. Indeed, considering the public interest impliedly validates any use that the public makes of the land once it is registered as a TVG, and undermines the scheme as a whole.

In summary, TVG registration does not exhibit the required characteristic of mutual self-interest. A TVG is not private to the community, as the practical effect of registration is to make the land available to the public generally. Furthermore, the mutual self-interest characteristic requires the resource to be governed exclusively in the public interest. However, the TVG regime, being governed by the same statutory scheme as commons, has an inherent concern for the public interest, precluding the exhibition of the required characteristic.

Homogeneity of interest

Land may only be registered as a TVG where it has been used for 'lawful sports and pastimes',[69] with the consequence of registration being the conferring of rights of recreation only. Therefore, it is arguable that, as the TVG regime only rewards and protects interests and uses of a limited class, homogeneity of interest is exhibited. However, three arguments against the exhibition of the characteristic can be made.

First, 'recreation' and 'lawful sports and pastimes' are broad umbrella terms, under which a wide variety of interests exist. For example, this chapter has already cited cases

[69] Commons Act 2006, s15.

relying on dog walking, the playing of cricket, maypole dancing and horse racing to secure TVG registration. The interests of the inhabitants when undertaking these different activities, whilst existing under the same umbrella classification, are not homogenous. For the purposes of exhibiting the homogeneity characteristic it would be better if either a list of specific permitted uses existed, or the umbrella terms were drawn more narrowly, as is the case with rights of common (see chapter six).

Second, unlike the law of prescriptive easements, the scope of the use rights conferred by TVG registration is not defined by the 20 years' use relied upon for registration.[70] Instead, a general right to recreate is conferred. Therefore, even if the inhabitants' use of the land relied on for TVG registration was in fact homogenous, there is no guarantee that the continuing use will be.

Third, given the variety of interests that may exist under the umbrella of recreation and lawful sports and pastimes, it is possible, if not likely, that those interests will at some point compete with each other. For example, if some inhabitants sought to use the land for shooting, yet others sought to use it for walking, it would be difficult for those two activities to be engaged in simultaneously. As such, as well as not exhibiting homogeneity, the inhabitants' interests are in direct competition.

The Supreme Court has addressed the second and third concerns listed above in *R (Lewis) v Redcar and Cleveland Borough Council and Another.*[71] Lord Hope, following Lord Hoffman in a previous House of Lords decision,[72] held there to be a principle of 'give and take' in village green law.[73] Similarly, Lord Rodger expressed the view that if the users had managed to co-exist for long enough to establish 20 years' qualifying use, it was unlikely that TVG registration would suddenly give rise to competition and antagonistic relationships between the inhabitants.[74] In addition, Lord Walker also expressed the view that there is 'little danger, in normal circumstances, of registration of a green leading to a sudden diversification or intensification of use', and

[70] *Oxfordshire County Council v Oxford City Council and Another* [2006] UKHL 25 [7] (Lord Hoffmann). Lord Rodger and Lord Walker concurred, with Lord Scott dissenting at [105] and Lady Hale refusing to consider the matter.
[71] [2010] UKSC 11.
[72] *Oxfordshire County Council v Oxford City Council and Another* [2006] UKHL 25.
[73] Ibid [74]-[75].
[74] *R (Lewis) v Redcar and Cleveland Borough Council and Another* [2010] UKSC 11 [84].

that ‘asymmetry between use before and after registration will in most cases prove to be exaggerated’.[75] Finally, Lord Kerr has expressed the similar view that the historical use of the land will be ‘approximate to that which will accrue after registration’.[76]

However, even if the principles of give and take, and the unlikelihood of diversification of interests and antagonistic behaviour hold true, the issue remains that it may not always be possible to describe the interests of the inhabitants as homogenous. Whilst the interests will fall under the same broad umbrella, the variety of those interests is wide. At best, the homogeneity characteristic is only exhibited to a limited degree.

Cohesive community

Clarke argues that a cohesive community provides the means and the method for promoting the mutual self-interest.[77] Furthermore, a cohesive community is more likely to enjoy homogeneity of interest, or be able to develop the necessary regulation to ensure a peaceful coexistence between non-homogenous interests; therefore, in light of the foregoing argument regarding homogeneity, it is imperative that the TVG regime exhibits the cohesion characteristic.

Community cohesion is enhanced when the community is of a manageable size and constituted of people with shared or similar experiences. To that end, geographical proximity or isolation of the community can be useful in promoting its cohesion.[78] Helpfully, the courts have considered community cohesion in the context of TVG registration, and have read it into the requirement that the inhabitants using the land must come from a ‘locality, or any neighbourhood within a locality’.[79]

Locality

Early attempts at defining ‘locality’ include that of Carnwath J in *R v Suffolk County Council Ex p Steed,* who said that a locality ‘should connote something more than a

[75] Ibid [47].
[76] Ibid [115].
[77] Clarke n65 329-330.
[78] ‘Introduction’ p30.
[79] Commons Act 2006, s15.

place or geographical area – rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right.'[80] Furthermore, guidance issued by the Department for Environment, Transport and the Regions in 2001 stated that 'locality' should not be determined according to administrative areas, 'but rather to a suitable area which the land in question might reasonably be expected to serve as a green'.[81] As such, early attempts at defining 'locality' were concerned with identifying a class of users that benefitted from the land, rather than an identification of 'precise geographical and legal boundaries'.[82] However, the definition of locality has since developed, placing greater weight on geography. Vos LJ has opined that 'locality' now has a settled technical legal meaning of 'an administrative district or an area within legally significant boundaries'.[83]

Whilst geographical proximity and isolation can be a useful indicator of the shared experiences necessary for community cohesion, and limits the size of the community, defining the community according to geographical and legal boundaries does have some shortcomings. McGillivray and Holder argue that 'the legal concept of locality advanced tends not to fit with the reality of many aspects of life'.[84] They argue that, with the increased mobility of persons, those residing in close geographical proximity to the land may no longer be its only users. For example, inbound commuters may engage in lawful sports and pastimes in a park local to their workplace. However, those persons are not part of the community, if the community is determined solely by geographical or legal boundaries. Consequently, the commuters' use of the land would not be qualifying for the purposes of registering the land as a TVG, nor would it be protected upon any registration, notwithstanding their shared experiences with other users regarding the land.

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[80] (1996) 71 P&CR 463, 477.
[81] Department for Environment, Transport and the Regions, *Countryside and Rights of Way Act 2000* circular (April 2001) para 80; see also D McGillivray and J Holder, 'Locality, Environment and the Law: The Case of Town and Village Greens' (2007) 3(1) *International Journal of Law in Context* 1, 10.
[82] McGillivray and Holder n81 9.
[83] 'Locality' is defined as an administrative district or area with legally significant boundaries in *Paddico (267) Ltd v Kirklees Metropolitan Council* [2011] EWHC 1606 (Ch) [97] by Vos J; see also *Oxfordshire County Council v Oxford City Council and Another* [2006] UKHL 25 [27] (Lord Hoffmann), *R (Laing Homes Ltd) v Buckinghamshire County Council* [2003] EWHC 1578 (Admin) [133]-[134] (Sullivan J), *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) [81] (Sullivan J), *Ministry of Defence v Wiltshire County Council* [1995] 4 All ER 931, 937 (Harman J).
[84] McGillivray and Holder n81 9.

However, instead of reinterpreting 'locality' to include users from outside a geographical area, the term 'inhabitant' could instead be reconceived. The commuter introduced above has a connection with the locality as a legal and geographical area, but cannot be described as an inhabitant. Therefore, to ensure that their use is qualifying, and protected upon registration, understanding inhabitant more widely than just a residence requirement would achieve the same result. For example, inhabitant could be reconceived to include those who work or spend extended periods of time in the locality. By relaxing the inhabitancy requirement, the community could be determined by both an objective geographical or legal boundary through the locality test, and subjective shared experiences through the inhabitant test. However, at present, inhabitant is not understood in this relaxed way, and inhabitancy is determined by residence.

Neighbourhood within a locality

'Neighbourhood' does not have a specific legal meaning, and has been open to judicial interpretation since its introduction into the test for TVG registration in 2000.[85] Sullivan J has asserted that a neighbourhood must have 'a sufficient degree of cohesiveness, otherwise the word "neighbourhood" would be stripped of any real meaning.'[86] Sullivan J's interpretation frees communities from the constraint of having to identify as inhabitants of an area defined by geographical or legal boundaries, with greater weight being placed on cohesion obtained through shared experiences of community members. For example, in *R (NHS Property Services Ltd) v Surrey County Council and Jones,* Gilbart J applied Sullivan J's definition of neighbourhood and took the view that '[t]he cohesion of a "neighbourhood" is not something which can be assessed by using some recognised technique',[87] and that the cohesion of a neighbourhood is essentially a matter of 'impression'.[88] Consequently, in *NHS Property Services Ltd* it was held that the elected members of a local authority (in its

[85] Commons Registration Act 1965, s22(1A), as amended by the Countryside and Rights of Way Act 2000, s98.
[86] *R (Cheltenham Builders Ltd) v South Gloucestershire District Council* [2003] EWHC 2803 (Admin) [85].
[87] [2016] EWHC 1715 (Admin).
[88] Ibid [115]-[119].

capacity as the commons registration authority) were as able as the barrister inspector presiding over the public inquiry to take a view on whether the applicants were inhabitants of a cohesive neighbourhood. In the event, the elected members of the local authority took a different view from the inspector, and opted to register the land as a TVG. The inspector detailed his reasons for rejecting the proposed neighbourhood (a triangular area enclosed by busy roads) at paragraph 177 of his report.[89] In particular, he found that the area relied upon did not, as a matter of impression, differ significantly from the adjoining areas, and that the properties within the claimed neighbourhood were of a mix of styles and age. Furthermore, he found that the facilities within the neighbourhood served the inhabitants of a much wider area than the claimed neighbourhood, the claimed neighbourhood lacked facilities that usually indicated cohesion (such as a church or a licensed premises), and that the neighbourhood had no name (which would have been expected of an area that has historical cohesiveness). Conversely, the local authority took the view that a neighbourhood did not need to include a particular type of building in order to be considered a neighbourhood, and that the crucial factor was whether the residents considered that they lived in a neighbourhood.[90] By upholding the decision of the local authority over that of the inspector's recommendation, Gilbart J further enforces the divorce from objective identification in favour of the subjective views of a community regarding the state of its cohesion or otherwise.

Nonetheless, any neighbourhood relied upon must be a 'neighbourhood within a locality'. As such, there is still a need to grapple with the narrow definition of both locality and inhabitant even when relying on the more flexible and subjective neighbourhood concept. However, following the speech of Lord Hoffmann in *Oxfordshire County Council v Oxford City Council and Another,*[91] the neighbourhood need not be wholly located within a single locality. His Lordship was of the view that 'neighbourhood within a locality' was drafted with 'deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries', and that neighbourhood within a locality should be read to mean a

[89] Inspector's Report and Recommendation to the Commons Registration Authority – Surrey County Council, Application No 1869 (9 June 2015).
[90] Surrey County Council, 'Planning and Regulatory Committee' meeting minutes (31/15) Application for Village Green Status: Land at Leech Grove Wood Leatherhead.
[91] [2006] UKHL 25.

neighbourhood within a locality or localities.[92] To read the clause as requiring a single locality would rid the neighbourhood requirement of any utility, and offer nothing different to the locality test.

Conclusion

Community cohesion is most likely to occur when a community is of a manageable size, and where members benefit from shared experiences. However, whilst geographical isolation and proximity to the land may promote the shared experiences necessary for cohesion, the two are not always concomitant. Therefore, to promote cohesion, the community whose use leads to, and is protected by, TVG registration, must be identified by a mixture of both objective factors (such as geographical and legal boundaries), as well as subjective factors (actual shared experiences and understanding).

Consequently, where the TVG registration relies on the use of the locality concept, the characteristic of community cohesion is only weakly exhibited. On the other hand, where the neighbourhood concept is relied upon, the cohesion characteristic is better exhibited. However, in order for the TVG regime to best exhibit the cohesion characteristic, it would be necessary to reconceive the inhabitant requirement and allow use by those who are not resident in the locality or neighbourhood, but who share experiences with the other users of the land, to be qualifying for the purposes of registration.

Idiosyncratic regulation

Unlike the commons registration scheme, the TVG regime does not benefit from the provision for commons councils in part 2 of the 2006 Act,[93] and the TVG regime has no inbuilt platform for self-governance. Therefore, mechanisms to secure self-governance must be found from outside the TVG regime. To that end, it will be recalled

[92] Ibid [27].
[93] A commons council may only be established over a TVG if the land is also subject to rights of common: Commons Act 2006, s26(2)(b).

that the use of private contracts was ruled out as a viable method of self-regulation in the introduction to this project.

Landowner regulation

The community has no natural right to manage TVG land, as such rights and powers are enjoyed by the legal titleholder. Similarly, unless the landowner is duty bound to consult the community, which they are not, the community has no right to be involved in the management of the land. Indeed, the only influence that the community has on the management of the land is that the landowner may not do anything that would interfere with the recreational rights conferred by TVG registration. A landowner can allow third-party access to, or use of, his land to whatever extent he pleases, provided that he and his licensees do not interfere with the use of the inhabitants.

As such, it appears that the TVG regime does not exhibit the required characteristic of community idiosyncratic regulation of the land. However, whilst the community have no right to regulate the land, three points must be noted in mitigation of the failure to exhibit the required characteristic.

First, a key concern of the idiosyncratic regulation characteristic is that regulation originating from outside the community has often proven fatal to common-property regimes, causing the destruction of both the regime and the resource itself.[94] However, that fear is not necessarily played out with landowner regulation of a TVG. The landowner is unable to regulate the land in such a way that is inconsistent with the rights conferred by registration, or which would threaten the existence of the TVG. Furthermore, if such threatening regulation was imposed, the community could enforce its rights against the landowner. Therefore, the community's rights ensure that the landowner may not exercise their rights and powers of management in such a way as to risk the destruction of the TVG and common-property regime, so some concern at the absence of idiosyncratic regulation is alleviated.

[94] DW Bromley (ed), 'Commons, Property and Common-Property Regimes', in *Making the Commons Work: Theory, Practice and Reality* (San Francisco: Institute for Contemporary Studies 1992) 8.

Second, in some instances, the land may be held by the community pursuant to one of the ownership vehicles considered in this project. If the land is so held, its regulation could in fact be controlled by the community, and the exhibition of the idiosyncratic regulation characteristic would depend on the extent to which each ownership vehicle exhibits the characteristic, not the TVG regime's exhibition of the characteristic.

Third, the landowner may opt to engage in voluntary consultation with the community, affording the community some de facto regulatory powers. Voluntary consultation may prove sensible and prudent for landowners. TVG registration generally reduces the utility and financial value of the land enjoyed by the landowner. Sharing the labour involved in managing a TVG prevents a landowner having to shoulder the full burden of its management, whilst obtaining a diminished benefit from the land itself. Furthermore, consulting the community when managing the land makes it is less likely that the landowner will inadvertently interfere with the rights of the community, reducing the likelihood of them incurring liability for such interferences. In practice, voluntary consultation, and in some instances delegation of regulatory functions, are particularly effective where the landowner is the local authority. The burden of managing the land can be shifted to those who are entitled to use and benefit from it, saving the local authority time and money that it can invest elsewhere.

Community interest groups

If a landowner is amenable to community-led regulation of TVG land, one way in which this might be achieved is through the use of a community interest group. Such groups are often made up of local volunteers who undertake to co-operate and support the landowner in the maintenance and supervision of the TVG. A community interest group does not have any direct legal authority over the land, unless the landowner delegates such powers. Nonetheless, the group may still regulate the land in a de facto sense; the relationship of co-operation makes it likely that the landowner may, within reason, adopt and formalise the regulation developed and put forward by the community interest group.

One example of a community interest group engaging in the management and regulation of a TVG is 'The Friends of the Trap Grounds' ('The Friends').[95] The group was established in 1996 to campaign for, and maintain, the Trap Grounds in North Oxford. The Trap Grounds comprise three acres of reed bed and four acres of scrubland, which, following a grant of planning permission over the land in 2004 for 45 new houses, became the subject of the landmark *Oxfordshire*[96] case and was registered as a TVG. The Friends took an active role in the registration process, with the Secretary of the community interest group (Catherine Robinson) applying to register the land as a TVG and participating in the subsequent judicial review proceedings and appeals to the Court of Appeal and the House of Lords. Once registered, The Friends continued their maintenance work in partnership with Oxford City Council. The interest group now runs regular 'work parties' to maintain the land, holds an annual AGM, engages in educational activities and monitors the wildlife and use of the land.

In effect, The Friends are the de facto managers of the land. If their situation was replicated across other TVGs, communities would, without having any direct legal power, be able to devise idiosyncratic regulation and either influence, or actually manage, the TVG. Where such arrangements exist, the idiosyncratic regulation characteristic may, at least in part, be exhibited.

Regulating recreational rights

The idiosyncratic regulation characteristic is not just concerned with the management of the land, but also the management of the community members' use of the land. To that end, voluntary consultation with the community will not produce rules that bind community members regarding the exercise of the rights conferred by TVG registration. To make any such agreement binding, community members would need to expressly undertake to be bound, yet the use of private contracts to secure such regulation was ruled out in the introduction to this project.

[95] See http://trap-grounds.org.uk (last accessed 9 July 2019) for more information on The Friends of the Trap Grounds.
[96] n91.

Community interest groups have greater potential to devise rules binding on community members regarding their exercise of the rights conferred by TVG registration. However, for such rules to occur, the community interest group would need to formalise its relationship and adopt one of the legal forms examined in chapters two to five of this project. Once that formalisation occurs, the exhibition of the idiosyncratic regulation characteristic depends on the degree to which the governance structures of those institutions exhibits the characteristic.

Alternatively, reliance on the soft forms of regulation described in the introduction to this project[97] may secure the idiosyncratic regulation of communal recreational rights. The use of soft regulation may be particularly suited to regulating TVG rights. TVG rights do not come into being until the land is registered as a TVG,[98] but the recreational use of the land must have persisted for at least 20 years prior to that registration. Accordingly, community regulation of its use throughout that period could not rely on the TVG regime or incidents of the TVG regime, with the likely candidate for any regulation being soft forms of regulation. Furthermore, there is no reason why, upon the registration of the land as a TVG, that regulation would suddenly be ineffective or disregarded, and it may continue to govern the community's use of the land. However, that regulation cannot be described as binding, as it does not enjoy legal force, and instead relies on voluntary adherence to social norms.

Conclusion

The local inhabitants do not enjoy rights and powers to manage the TVG in their own interests and for their own benefit. Instead, management powers are reserved to the landowner, who has no duty to consult or include the community in management decisions. Nonetheless, mechanisms exist through which the community may contribute to the management of the land.

However, for the TVG regime to exhibit the idiosyncratic regulation characteristic, communities must be able to devise binding regulation regarding members' exercise

[97] 'Introduction' pp32-33.
[98] *Oxfordshire County Council v Oxford City Council and Another* [2006] UKHL 25 [43] (Lord Hoffmann).

of TVG rights. That regulation is only possible if the community has formalised its relationship, which it may not have done, and whether the legal mechanism used in doing so allows for such regulation. As such, the TVG regime itself does not exhibit the idiosyncratic regulation characteristic.

Sanctions

Sanctions for breach of idiosyncratic regulation can only exist where there is regulation that may be breached. Therefore, as the scope for devising binding idiosyncratic regulation is limited, so is the exhibition of the sanctions characteristic.

The only instances in which sanctions for the breach of regulation may exist is if the TVG is regulated by a community interest group that has formalised its relationship, or if the community holds title to the TVG through one of the legal structures considered in chapters two to five of this project. In those instances, the community is able to devise binding regulation to the extent that their legal institution allows, and are also able to sanction breaches to the same extent. Therefore, it is not the TVG regime that is providing for both regulation and sanctions, but the legal form, if any, adopted by the community.

External sanctions

Sanctions external to a scheme of idiosyncratic regulation may help control and moderate the behaviour of community members. For example, any community member who exceeds the use rights conferred by registration will be liable for trespass at the suit of the landowner, and any community member who interferes with the use rights of another community member may be liable for private nuisance.

Furthermore, the Victorian statutes that protect both commons and TVGs contain sanctions. For example, section 12 of the Inclosure Act 1857 sanctions undesirable conduct by members of the community (and the public generally) by making it a criminal offence to do damage to, deposit foreign substances on, or obstruct the lawful use of a green in anyway. In addition, section 29 of the Commons Act 1876, renders it a public nuisance to encroach upon or inclose a green, erect any structure upon a green,

or disturb, occupy or interfere with the soil of the green. Any act that is deemed to fall within these definitions may attract criminal sanctions from either the magistrates' court or crown court, or be the subject of civil proceedings by the Attorney General or local authority. In addition, if TVG registration occurred pursuant to the 2006 Act, the local authority may initiate proceedings to protect the land against unlawful interference, or against any person who commits an offence, where the land is not recorded on the register of title and the titleholder is not identifiable.[99] In contrast, under the 1965 Act, TVG registration required the name of the alleged landowner to also be registered,[100] and it was they who should commence any proceedings to protect the land. However, if no person was registered as the owner of the land under the 1965 Act, or registered as the titleholder of the land pursuant to the Land Registration Acts of 1925 and 1936, the 1965 Act made provision for the vesting of title to the land in the local authority,[101] which would then be able to commence proceedings to protect the land.

At this juncture it is worth considering the compatibility of the statutory offences with the conceptual underpinning of the TVG regime. In particular, the Commons Act 1876 uses the mechanism of public nuisance to protect a TVG; this is curious, as TVG registration is attained only by a specific community's use of the land, and rights are only conferred upon members of that community and not the public at large. It makes little sense to categorise interferences under the 1876 Act as public nuisance, especially a local inhabitant with TVG rights would need to show special damage above and beyond that suffered by other local inhabitants in order to initiate a private action for public nuisance.

However, despite the availability of these external sanctions, the TVG regime still does not exhibit the sanctions characteristic. The characteristic is concerned with sanctions for the breach of idiosyncratic regulation, which secures the enforcement of that regulation. External sanctions have no relationship with the idiosyncratic regulation of the community, and do not aid the exhibition of the characteristic.

[99] Commons Act 2006, s45.
[100] Commons Registration Act 1965, s1(1)(c).
[101] Commons Registration Act 1965, s8(3).

Conclusion

The TVG regime's failure to exhibit the idiosyncratic regulation characteristic, and the inherent link between that characteristic and sanctions, precludes the exhibition of the sanctions characteristic. Sanctions are only provided for external to the TVG regime, through either private nuisance, criminal sanctions in the Victorian statutes, or the institution used (if any) by a community when formalising their relationship.

III. CONCLUSION

The TVG regime does not exhibit the eight characteristics of a mutual self-interest common. In particular, the ability to deregister TVGs prevents the exhibition of the perpetuity and intergenerational equality characteristic, and the absence of a platform for self-regulation, such as the commons councils applicable to commons registration, means that the TVG regime does not exhibit the idiosyncratic regulation or sanctions characteristics.

Additionally, the TVG regime suffers the same limitation as the other regulatory schemes examined in this project; TVG registration confers rights on the community, but does not transfer the legal title to the resource. As such, whilst those rights are conferred on the community only, the community is unable to exercise the exclusory powers necessary to exhibit the exclusion of non-members characteristic. Furthermore, also in common with the other regulatory schemes, the TVG regime has an inbuilt concern for the public interest, as well as other traits of an open-access regime, precluding the exhibition of the mutual self-interest characteristic.

This project will now turn to consider the third and final regulatory scheme (the planning regime) to assess whether its utility can better that of the commons registration scheme and TVG regime.

Chapter 8 | PLANNING LAW

The final regulatory scheme examined in this project is the town and country planning regime. As with all of the regulatory schemes examined in this project, the planning regime does not transfer title to the land to the community. Instead, the planning system enables land to be designated or allocated for particular purposes,[1] including for the provision of recreational space, which may be used to protect and secure mutual self-interest commons.

Many methods exist by which land may be allocated in the planning system. Two prominent methods are allocations made through local plans and neighbourhood development plans. Similarly, there are many allocations that may be made, including allocations for housing, recreation and education facilities. This chapter shall first outline the relevant aspects of the planning regime, focusing specifically on how land may be allocated, and for what purposes. It shall then demonstrate that using planning allocations of land cannot not secure a mutual self-interest common, and the eight characteristics are not exhibited.

In particular, planning law is unsuitable for the purposes of securing a mutual self-interest common because the regime does not confer rights. Allocating land for a specific purpose does not confer any rights on a community to use the land for that purpose, and use rights must be sourced from elsewhere. The failure to confer any rights leaves the protection of the community interest in a precarious position, whilst also inhibiting the exhibition of the eight required characteristics.

I. LOCAL AND NEIGHBOURHOOD DEVELOPMENT PLANS

Land may be allocated through both local plans and neighbourhood development plans (also known simply as 'neighbourhood plans'). These plans are separate but linked, as

[1] 'Designation' is usually the term used when the land is restricted in some way (such as green belt), whereas 'allocation' is the term used when the land is selected for positive use (such as housebuilding). The terms shall be used interchangeably throughout this chapter, unless express distinction is needed.

they form part of the 'development plan'.[2] The development plan is an important assortment of documents, as any application for planning permission must be determined in accordance with the development plan unless material planning considerations indicate otherwise.[3] The local planning authority must also have regard to any post-examination neighbourhood plan when determining planning applications.[4]

Consequently, allocations made in local and neighbourhood plans are of huge significance, and will directly inform decisions regarding the land and its surrounding area. As such, allocating land may preserve and protect the land for a particular purpose in the face of a planning application to put the land to an alternative use. For example, land allocated as recreational space may be protected from development. Where that land is a de facto mutual self-interest common, the allocation preserves the land for the community.

As the local and neighbourhood plan together form the development plan, it is rarely acceptable that one contradicts the other. To that end, there are statutory rules regarding the consistency of the policies contained in the two plans,[5] as well as comprehensive policy guidance on the matter.[6] Nonetheless, the two plans are distinct, and have distinguishing features.

Plan-making

A local planning authority makes a local plan (in the context of plan-making, to 'make' a plan is to give the plan legal effect). The local planning authority must prepare the

[2] Planning and Compulsory Purchase Act 2004, s38. The Neighbourhood Planning Act 2017, s3, amended 2004 Act by inserting section 3A which provides for the incorporation of neighbourhood development plans approved by referendum but yet to be made by the local planning authority as part of the development plan (see the Neighbourhood Planning Act 2017 (Commencement No. 1) Regulations 2017, regulation 2b). Explanations of the referendum process and 'making' of neighbourhood development plans can be found later in this chapter.
[3] Town and Country Planning Act 1990, s70(2)(a) read together with the Planning and Compulsory Purchase Act 2004, s38(6).
[4] Inserted into the Town and Country Planning Act 1990, at s70(2)(aza), by the Neighbourhood Planning Act 2017, s1, as brought into force by the Neighbourhood Planning Act 2017 (Commencement No. 1) Regulations, regulation 2a. See later in this chapter for an explanation as to the examination process for neighbourhood development plans.
[5] See, for example, the Town and Country Planning Act 1990 sch 4B para 8(2)(e); Town and Country Planning (Local Planning) (England) Regulations 2012, regulation 8.
[6] Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (June 2019) [29] fn 16.

plan[7] and, once prepared, submit it to the Secretary of State. The Secretary of State appoints an independent examiner to determine whether the plan is sound and compliant with the statutory rules.[8] Only once the plan has passed independent examination, either with or without modifications as per the recommendation of the examiner, can the local planning authority formally adopt it.[9] Once adopted, the plan has legal effect and forms part of the development plan.

Neighbourhood plans differ from local plans as they are prepared by a 'qualifying body' [10] (either a parish council or an organisation or body designated as a neighbourhood forum),[11] but are still 'made' by the local planning authority.[12] Neighbourhood plans are also a newer concept, having been introduced by the Localism Act 2011, which heavily amended both the Planning and Compulsory Purchase Act 2004 ('PCPA 2004') and the Town and Country Planning Act 1990 ('TCPA 1990') in order to incorporate them. Further amendments to the statutory framework for the purposes of incorporating neighbourhood plans, many of which are still yet to come into force, are made by the Neighbourhood Planning Act 2017 ('NPA 2017').

As with the local plan, a statutory code sets out the process by which a neighbourhood plan should be prepared and adopted.[13] The bulk of this code can be found in schedule 4B of the TCPA 1990,[14] as well as sections 61E-61Q of the TCPA 1990, but other relevant provisions are scattered throughout the PCPA 2004, the NPA 2017 and in a

[7] The plan should be prepared in accordance with the Planning and Compulsory Purchase Act 2004, part 2, Town and Country Planning (Local Planning) (England) Regulations 2012, part 6, and the relevant policy guidance.
[8] Planning and Compulsory Purchase Act 2004, s20. The Secretary of State may intervene under section 21 if he feels the plan is unsatisfactory.
[9] Planning and Compulsory Purchase Act 2004, s23.
[10] Planning and Compulsory Purchase Act 2004, s38A; Town and Country Planning Act 1990, s61E(1) and s61F.
[11] Town and Country Planning Act, s61E(6). See section 61F(5) of the 1990 Act for the definition of a neighbourhood forum.
[12] Planning and Compulsory Purchase Act 2004, s38A(4).
[13] For a discursive account of the neighbourhood planning process see R Stanier, 'Local heroes: neighbourhood planning in practice' [2014] 13supp *Journal of Planning and Environment Law* OP105, and J Walker, 'Neighbourhood Planning on the Ground' [2014] 13supp *Journal of Planning and Environment Law* OP117.
[14] Schedule 4B concerns the process for the making of neighbourhood development orders. However, pursuant to section 38A(3) of the Planning and Compulsory Purchase Act 2004, schedule 4B of the 1990 Act also applies to neighbourhood development plans.

series of statutory instruments and policy documents.[15] Once a neighbourhood plan has been prepared it must be submitted to the local planning authority, which must send the plan for external examination as it does a local plan.[16] Once the independent examiner is satisfied that the plan is appropriate, and that it meets the basic conditions listed in schedule 4B paragraph 8 of the TCPA 1990, they may recommend that the plan should be submitted to a referendum.[17] The local authority may deviate from the examiner's finding,[18] but the Secretary of State has the power to intervene in that situation.[19]

If the neighbourhood plan is submitted for referendum, this will be held according to the provisions in schedule 4B paragraphs 14-16 of the TCPA 1990 (usually it will be those living within the relevant neighbourhood area who are eligible to vote). If more than half of those who vote do so in favour of adoption, the local planning authority must then 'make' the plan,[20] at which point it used to become of the development plan. However, since the enactment of the NPA 2017, once a plan is approved at referendum, it has the same legal force as a plan that has been 'made', and is considered part of the development plan.[21]

Content

The local plan sets out the strategic policies for the local plan area. Those policies should include, but are not limited to, policies concerning the provision of jobs and housing, the provision of leisure and recreational facilities and the provision of infrastructure.[22] It is through these policies that land is allocated and designated for

[15] Neighbourhood Planning (General) (Amendment) Regulations 2015; Neighbourhood Planning (Referendums) (Amendment) Regulations 2014; Neighbourhood Planning (Referendums) (Amendment) Regulations 2013; Neighbourhood Planning (Prescribed Dates) Regulations 2012; Neighbourhood Planning (Referendums) Regulations 2012; Neighbourhood Planning (General) Regulations 2012.
[16] Town and Country Planning Act 1990, schedule 4B para 7.
[17] Town and Country Planning Act 1990, schedule 4B para 10.
[18] Town and Country Planning Act 1990, schedule 4B paras 12 and 13.
[19] Town and Country Planning Act 1990, schedule 4B paras 13B and 13C.
[20] Town and Country Planning Act 1990, s38A(4).
[21] Planning and Compulsory Purchase Act 2005, s38(3A), as amended by the Neighbourhood Planning Act 2017, s3.
[22] *National Planning Policy Framework* n6 [20].

specific purposes. The plan should also have a long-term vision, recommended to be 15 years, with flexibility to cater for changes in circumstances and need.[23]

A neighbourhood plan is similar to a local plan in that it sets planning policies that form part of the development plan. In addition, '[t]he ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area',[24] which essentially means that the neighbourhood plan should be made in conformity with the local plan.

Community engagement

Neighbourhood plans engage the community in a way that local plans do not. The intention behind neighbourhood planning was to decentralise control over the planning system in line with the Conservative government's wider political aim of decentralising and dispersing power in society. The National Planning Policy Framework ('NPPF') directly acknowledges the aim of community empowerment and states that '[n]eighbourhood planning gives communities direct power to develop a shared vision for their area'.[25] As such, the neighbourhood planning process sits more easily with the concept of a mutual self-interest common than the local planning process.

Community involvement is at the heart of neighbourhood plan-making; the plan is prepared by the community, through the organisational machine of either a parish council or neighbourhood forum, and allows the community to influence the direction of local policy and land use. However, some criticisms have been made regarding the true extent of communities' influence over planning policy and land allocations. For example, Stanton argues that neighbourhood planning suffers from 'centralism', which prevents the initiative from delivering a truly community-led approach to local planning and decision-making regarding land use.[26] By the term 'centralism' Stanton is referring to the notion that the Secretary of State and central government keep an

[23] *National Planning Policy Framework* n6 [22].
[24] *National Planning Policy Framework* n6 [29] fn 16. The quote is taken from the March 2012 version of the guidance produced by the Department for Communities and Local Government at [184].
[25] *National Planning Policy Framework* n6 [29].
[26] J Stanton, 'The Big Society and Community Development: Neighbourhood Planning Under the Localism Act' (2014) 16(4) *Environmental Law Review* 262, 269-271.

'ever-watchful eye'[27] over neighbourhood planning activities,[28] and restricts the policies that a community may put forward when assembling a neighbourhood plan by requiring the plan to be in accordance with both national policy and the strategic policies of the local plan. Whilst that observation is undoubtedly true, it cannot be denied that neighbourhood planning does give a community at least some power to allocate land for particular purposes, which in turn allows communities to protect land that has a particular community value. The true extent of that protection, and its effectiveness in securing a mutual self-interest common, will be considered shortly.

II. LAND ALLOCATIONS AND DESIGNATIONS

As noted earlier,[29] designations typically refer to instances in which land use is restricted in some way (such as green belt), whilst allocations usually refer to instances in which the land is earmarked for a particular use (such as housebuilding). The terms are used interchangeably throughout this chapter unless distinction is required.

In theory, land can be allocated for almost any purpose, subject to two qualifications. First, the allocation must be for a land use planning purpose, meaning that the allocation must relate to the character of the use of the land. Second, the purpose must be specific, and the allocation made through the correct process. However, some allocations have a strong grounding in statute and policy. It is likely that using those well-established allocations will be a more effective means of protecting the land, as the understanding of the consequences of those allocations will be better developed than if the designation was novel. Therefore, it is unlikely that the land would be expressly allocated for the purposes of securing a mutual self-interest common. Instead, it is more likely that the land will be allocated for purposes such as recreation, or designated as Local Green Space. As such, the planning system only indirectly protects mutual self-interest commons. The protection arises as a tangential benefit of the allocation actually made, and it is not the common-property regime per se that is protected. Whether that indirect

[27] Ibid 269.
[28] The 'ever-watchful' eye of the Secretary of State and central government has intensified since Stanton made this point, as schedule 4B paras 13B and 13C of the Town and Country Planning Act 1990 give the Secretary of State greater powers of intervention in the Neighbourhood plan-making process.
[29] n1.

protection can adequately secure a mutual self-interest common will be exposed through the analysis of the exhibition of the eight required characteristics.

Allocations

Established allocations that may be used to protect a mutual self-interest common include allocations for open space and recreational facilities. Such allocations have a strong grounding in the NPPF, which expressly states that a plan-making authority should plan positively for the provision of social and recreational facilities, including shared spaces and community facilities such as open spaces.[30] Other well-established allocations can be found throughout the NPPF should a community's desired use of the land be better reflected by an alternative purpose.

Further established land uses can be found in the Town and Country Planning (Use Classes) Order 1987. Of the uses provided for in the Order, class D2 uses relate to assembly and leisure, including indoor or outdoor sports or recreations.[31] However, relying on the Order to secure a mutual self-interest common may be precarious. The Order provides that once allocated a land class, the land may be used for any of the specified purposes within that class without alterations in the use being classed as 'development', for which planning permission may need to be sought.[32] Therefore, class D2 land may be put to the other class D uses listed in the Order, such as a cinema or bingo hall,[33] which may not protect the mutual self-interest common for the purposes for which the community uses it. As such, the most effective allocations for securing a mutual self-interest common are likely to be specific allocations, such as those suggested in the NPPF, as opposed to land class allocations under the 1987 Order.

Designations

Local Green Space ('LGS') designation may be particularly useful for securing a mutual self-interest common, and carries an established meaning and accompanying

[30] *National Planning Policy Framework* n6 [92].
[31] Town and Country Planning (Use Classes) Order 1987, schedule 1 part 4 para 2(e).
[32] Town and Country Planning (Use Classes) Order 1987, article 3(1).
[33] Town and Country Planning (Use Classes) Order 1987, schedule 1 part 4 paras 2(a) and (c).

considerations that can be found throughout the NPPF and the Planning Practice Guidance ('PPG').

Designating land as LGS affords 'special protection against development for green areas of particular importance to local communities.'[34] The effect of LGS designation is that the land is treated as if it were Green Belt.[35] In practice, the designation makes it very difficult to construct new buildings on the land, as new buildings are, with some exceptions, deemed to be inappropriate development and harmful to the Green Belt, and will not be granted planning permission.[36] Therefore, for the most part, LGS land is protected from development, and the open space preserved.

The pre-requisites to designating land as LGS resonate with many of the key features of a mutual self-interest common. In particular, the NPPF provides that

> The Local Green Space designation should only be used where the green space is:
>
> (a) in a reasonably close proximity to the community it serves;
>
> (b) demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
>
> (c) local in character and is not an extensive tract of land.[37]

Requirement (a) resonates with the need for the communal resource to be proximate to the mutual self-interest community.[38] Requirement (b) resonates with the requirement that a mutual self-interest community has a shared understanding and experiences with the resource.[39] Finally, requirement (c) resonates with the requirement that the land is private to the community,[40] which is more likely if the resource is of a manageable size

[34] Ministry of Housing, Communities and Local Government, *Planning Practice Guidance* [005] Reference ID 37-005-20140306.
[35] Ibid [020] Reference ID 37-020-20140306.
[36] *National Planning Policy Framework* n6 [143]-[147].
[37] *National Planning Policy Framework* n6 [100].
[38] 'Introduction' p30.
[39] 'Introduction' pp17-21.
[40] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 329.

and does not have the outward appearance of being open-access, as an extensive tract of land might. Nonetheless, whilst LGS designation may resonate with the features of a mutual self-interest common, it still only protects the open nature of the land, and does not confer any use rights on a community.

Rights

The planning regime suffers a key shortfall in the protection of mutual self-interest commons. Unlike the other regulatory schemes examined in this project, land allocations contained in the development plan do not confer any rights upon the community. To that end, in the context of LGS designation, the PPG expressly states that

> Designation does not in itself confer any rights of public access over what exists at present. Any additional access would be a matter for separate negotiation with land owners, whose legal rights must be respected.[41]

However, the titleholder of land designated as LGS is under no obligation to make the land available for public use and access as a result of that designation if the land was not previously available to the public. In addition, land may be considered for designation even if there is no public access.[42] Therefore, it is possible that land designated with the intention of securing a mutual self-interest common will never be subject to any use rights in favour of the community.

The assertion that planning allocations do not confer any rights is supported by two further justifications. First, allocations in the development plan aid the determination of planning applications. If successful, those planning applications result in the grant of planning permission, which does not confer rights to use land in a particular way. Lord Neuberger describes the effect of planning permission as the 'bar to the use imposed by planning law, in the public interest, has been removed'.[43] As such, if a grant of planning permission itself confers no rights, it is inconceivable that the policies guiding that grant may do so.

[41] *Planning Practice Guidance* n34 [017] Reference ID 37-017-20140306.
[42] *Planning Practice Guidance* n34 [017] Reference ID 37-017-20140306.
[43] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13 [89] (Lord Neuberger).

Second, the development plan in which land allocations are contained is merely a policy presumption[44] and a guide[45] from which the planning decision-maker can depart. In particular, section 38(6) of the PCPA 2004 provides that determinations need not be made in accordance with the development plan if material considerations indicate otherwise, with case law examples evidencing instances of such departures.[46] It is therefore difficult, if not impossible, to assert that such precarious and unstable interests amount to 'rights'.

Instead, allocations and designations of land confer interests on the community that are enforceable as a matter of public law only. In essence, land allocations cause a planning decision-maker to incur duties when making decisions about the land and determining planning applications, but does not grant any entitlement or hard-edged property rights. As such, the only right that the community enjoys is a right that due regard will be had to the land's allocation, enforceable through judicial review proceedings only.

Finally, the development plan's failure to confer rights means that a community must source any rights over the land, including use rights, from elsewhere. The source of those rights may be a grant from the landowner, or a statutory scheme upon which title to the land is held, such as section 12 of the Housing Act 1985 or section 10 of the Open Spaces Act 1906. However, where use rights are sourced from statutory provisions, those rights are usually conferred on the public generally, as opposed to a specific community. Even if the provision is intended to confer rights on a particular class of persons, the effect of the statutory scheme is often to confer rights on the public at large. For example, section 12 of the Housing Act 1985 is intended to confer benefits on the tenants of a housing scheme; however, as the land appears to be for general public use and the exercise of distinguishing between classes of user is impracticable, the public as a whole benefits.[47] Therefore, statutory use rights seem more suited to securing an open-access regime, not a mutual self-interest common.

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[44] *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447, 1458 (Lord Clyde).
[45] *First Secretary of State v Sainsbury's Supermarkets Ltd* [2005] EWCA Civ 520 [16] (Sedley LJ) describes policies as a 'not a rule but a guide'.
[46] See, for example, *Suffolk Coastal District Council v Hopkins Homes Ltd and another* [2017] UKSC 37 [8] (Lord Carnwath) approving *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447.
[47] *R (Barkas) v North Yorkshire County Council* [2011] EWHC 3653 (Admin) [27]-[32] (Langstaff J).

If, on the other hand, use rights are sought from the landowner, two obvious problems exist. First, as the landowner is under no obligation to grant use rights, especially where none existed before the allocation of their land, there is no guarantee that the community would be successful in obtaining such a grant. Second, even if a landowner does grant use rights to a community, the strength of that entitlement is dependent on the nature of the use rights. For example, in the commons registration and TVG regimes, the use rights enjoyed by the community are proprietary, ensuring that the use rights are stable and enduring. However, if the community is relying on a gratuitous grant from the landowner, as they would be when seeking use rights to complement a land allocation, the rights granted may, and most likely will, be only personal in nature. Personal rights are more precarious than proprietary rights; they may be revoked at will by the landowner, which would leave the community members without any right to use the land allocated for their benefit.

Community right-holding

The failure to confer rights on a community also leaves the planning regime in a unique position as compared to the other legal institutions examined in this project; the planning regime is neither an example of the 'class action concept of collective rights', nor an instance in which a community itself holds rights that are enforceable by individual members.[48] As common-property arrangements should be the latter, early indications all point towards the unsuitability of the planning regime in securing a mutual self-interest common.

Summary

The local and neighbourhood planning processes allow land to be allocated and designated for particular purposes. It is unlikely that land will be allocated for the purposes of securing a mutual self-interest common, as that is not a recognised policy aim or land use purpose within the planning framework. Instead, readily understood and well-stablished allocations may be used to preserve the land, such as allocation for

[48] M McDonald, 'Should Communities Have Rights? Reflections on Liberal Individualism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218. See 'Introduction' pp20-21.

recreational use, or LGS designation. However, even those allocations do not confer use rights on the community; the land is preserved for the purpose, but use rights must be sourced from elsewhere. With that in mind, this chapter shall now turn to assessing the degree to which planning allocations exhibit the eight required characteristics of a mutual self-interest common.

III. EXHIBITION OF REQUIRED CHARACTERISTICS

Inalienability

Alienations defeating communal rights

As with the other regulatory schemes examined in this project, allocations for land use planning purposes do not transfer title to the community. Therefore, the powers of an owner, including the power to alienate the land, are vested in an underlying owner,[49] not the community. Furthermore, allocations made through the planning regime do not restrict the alienations of land, and the titleholder remains free to exercise their alienation powers. In particular, the PPG expressly states that '[d]esignating a green area as Local Green Space would give it protection consistent with that of Green Belt, but otherwise there are no new restrictions or obligations on land owners.'[50]

However, it is not alienations of the land per se that are the concern of the inalienability characteristic, but alienations of the land that defeat communal rights. To that end, land allocations are not defeated by alienations of the legal title. The status attained by allocation survives any transfer of the land, and will continue to affect the land regardless of who the legal titleholder is. Therefore, even though allocations do not confer rights on the community, the allocation of the land itself exhibits the first limb of the inalienability characteristic, as allocations are not defeated by transfers of the legal title to the land.

[49] The land may be in public or private ownership. In particular, LGS land does not need to be publicly owned: *Planning Practice Guidance* n34 [019] Reference ID 37-019-20140306.
[50] [020] Reference ID 37-020-20140306.

In the introduction to this project it was noted that a complete prohibition on alienations of the communal resource may in fact be detrimental to the mutual self-interest common. In particular, the ability to alienate the resource may facilitate transfers to a transferee who is especially well equipped to manage the resource as a common.[51]

To that end, the assets of community value ('ACV') scheme, also known as the community right to bid, is of note. The ACV scheme was introduced as part of the wider movement of community empowerment under the Localism Act 2011,[52] as supplemented by the Assets of Community Value (England) Regulations 2012. The Government summarised the ACV provisions in a 2011 policy statement as provisions that

> …give communities a right to identify a building or other land that they believe to be of importance to their community's social well-being. The aim is that, if the asset comes up for sale, then they will be given a fair chance to make a bid to buy it in the open market.[53]

The ACV provisions were introduced to abate the concern that '[o]ver the past decade communities have been losing local amenities and buildings of great importance to them – the village or housing-estate shop or pub or community centre or village hall'.[54] Published figures detail that the ACV provisions have been fairly successful in meeting the concern: more than 3000 assets have been listed as ACVs, including 1200 pubs and over 256 local sporting assets (including football stadiums,[55] bowling greens and cricket pavilions).[56] In addition, the PPG expressly states that the ACV provisions may

[51] 'Introduction' p24.
[52] Part V, chapter III.
[53] Department for Communities and Local Government, *Assets of Community Value- Policy Statement* (September 2011) 5. See also Department for Communities and Local Government, *Community Right to Bid: Non-Statutory Advice Note for Local Authorities* (October 2012) [2.20].
[54] Department for Communities and Local Government, *Assets of Community Value- Policy Statement* (September 2011) 4.
[55] High profile examples include Old Trafford (Manchester United), Anfield (Liverpool) and The Valley (Charlton Athletic FC).
[56] See S Adamyk, *Assets of Community Value: Law and Practice* (Wildy, Simmonds & Hill Publishing 2017) chapter 9 for a summary of the key statistics concerning the use of the ACV scheme.

apply to LGS land.[57] As such, land allocated for community purposes in a local or neighbourhood plan may also be listed as an ACV, and may benefit from the scheme.

The ACV scheme enables parish councils (in England), community councils (in Wales) and voluntary or community bodies with a local connection[58] to nominate land of community value to be included on a list of community assets.[59] Land of community value is taken to mean land that 'furthers the social wellbeing or social interests of the local community',[60] with 'social interests' further dissected to mean either religious, cultural or sport interests.[61] If the land is accepted for listing, and the landowner chooses to dispose of it,[62] the community is given a period in which to prepare a bid to purchase the asset. When the landowner indicates to the relevant authority his intention to sell, he triggers an interim period of six weeks (known as an 'interim moratorium') in which the community must express in writing its intention to make a bid.[63] Intentions to bid must be made by a 'community interest group'[64] and, if done within the six-week moratorium, the period is then extended to a full moratorium of six months, in which time the community must prepare and present its bid to the landowner. A 'community interest group' is defined in narrower terms than the voluntary or community bodies that may nominate land as an ACV, and in England is taken to mean a parish council in whose area the land is located, or those voluntary community bodies listed at regulation 5(1)(d)-(g). As such, a community bidding to acquire title to a listed asset must have formalised its legal relationship, and have either adopted one of the corporate forms examined in chapters four and five of this project or be a parish council. That formalisation is necessary to enable the community to hold the legal title to land.

[57] *Planning Practice Guidance* n34 [022] Reference ID 37-022-20140306.
[58] 'Voluntary or community body' is defined in the Assets of Community Value (England) Regulations, regulation 5.
[59] Localism Act 2011, s89(2).
[60] Localism Act 2011, s88(1)(a).
[61] Localism Act 2011, s88(6).
[62] The only dispositions that are qualifying for these purposes are a disposition of the freehold interest with vacant possession and a grant of a lease for 25 years or more, see Localism Act 2011, s96; see also section 95(5) for a list of excluded dispositions.
[63] See the Localism Act 2011, s95 and Assets of Community Value (England) Regulations, regulation 13 for the processes and time limits by which various applications must be made by both the landowner and the interested community.
[64] Localism Act 2011, s95(3)(a).

However, notwithstanding the apparent success of the ACV scheme, it is inherently limited. The right to bid conferred by the Localism Act 2011 is neither a right to buy, nor a right of pre-emption; at best it is a right to be informed of the owner's intention to enter into a relevant disposition (as defined in sections 95 and 96 of the 2011 Act). The real benefit in listing the asset, which, in any event, the landowner can apply to have reviewed,[65] is to afford the community a greater amount of time in which to assemble its bid. There is no guarantee that the landowner will consider its bid, or sell to the community, and the only duty that ACV listing imposes on the landowner is a duty to wait and see if the community wishes to bid for their land. Furthermore, once the moratorium period has been triggered and then expires, the landowner enjoys an eighteen-month protected period where no further moratorium can be triggered,[66] and the landowner may enter into whatever disposal of the land he so choses within that time.

Nonetheless, even if title is not transferred to the community through the ACV scheme, the scheme is still useful for protecting communal resources. ACV status is a material planning consideration,[67] which may prevent development of the land in a way that is inconsistent with the community's interest in it. For example, in 2013 Brent Council rejected a planning application for the residential redevelopment of a library registered as an ACV because

> The applicant has failed to demonstrate that the proposed community hub would be of a size, layout and quality that sufficiently and suitably meets the local need for community facilities, to a degree that it would adequately compensate for the loss of the existing community facility onsite, which has been listed as an Asset of Community Value.[68]

Whilst the community was not seeking to acquire the asset (and could not seek to acquire it, given that there was no relevant disposition), the ACV listing still protected the resource and the community interest that existed in it. Therefore, the ACV scheme's

[65] Localism Act 2011, s91.
[66] Localism Act 2011, s95(4); Assets of Community Value (England) Regulations 2012, regulation 13.
[67] Department for Communities and Local Government, *Assets of Community Value- Policy Statement* (September 2011) 4; see also Department for Communities and Local Government, *Community Right to Bid: Non-Statutory Advice Note for Local Authorities* (October 2012) [2.20].
[68] Brent Council, planning application reference 13/2058.

use in protecting mutual self-interest commons is wider ranging than just allowing for the community acquisition of the communal resource.

Severance and alienation of a discrete share

As land allocations do not confer any rights to the resource, community members do not have a discrete share or vested interest in the resource that they may treat as their own. Therefore, whilst the planning scheme's failure to confer rights on the community may inhibit its use in securing a mutual self-interest common and the exhibition of other required characteristics, it actually enables the exhibition of the second limb of the inalienability characteristic.

Summary

Land allocations made through the planning regime do not prevent alienations of the legal title to the land. Nonetheless, as allocations survive transfers of the land and continue to protect it for the stated purpose, the first limb of the inalienability characteristic is exhibited. Furthermore, it is desirable that the land is able to be alienated, as this may facilitate a transfer of the communal resource to the community, or a landowner who is well-suited to its management, whether through the ACV scheme or otherwise.

The second limb of the inalienability characteristic is also exhibited, as the community members enjoy no rights to the resource that they may sever and alienate. However, whether the absence of rights being conferred is in fact desirable in the pursuit of securing a mutual self-interest common as a whole is questionable, and may prove fatal for the exhibition of other characteristics.

Perpetuity and intergenerational equality

Land allocations made through the planning system do not exhibit the perpetuity and intergenerational equality characteristic. Allocations have a long-term outlook. For example, the NPPF states that strategic policies should look ahead over a minimum 15

year period,[69] and that LGS designation should be capable of enduring beyond the end of the plan period.[70] However, land allocations are neither a permanent nor irreversible action, and there are many ways in which land can lose its allocation, preventing future generations of the community benefitting from that allocation. The most obvious way of land losing or being subject to re-allocation is through a review of the local or neighbourhood plan that made the initial allocation.

Land may also lose its allocation as a result of conflicting policies within a development plan. In particular, an emerging local or neighbourhood plan may seek to re-allocate land for other uses. With regards to emerging local plans, regulation 8(4) of the Town and Country Planning (Local Planning) (England) Regulations 2012 provides that its policies must be consistent with the adopted development plan, but that an emerging local plan policy can supersede an existing policy in the development plan, provided the plan states its intention to do so, and identifies the policy that it intends to supersede.[71] Therefore, if an adopted development plan contains a policy that designates space as a LGS, for example, an emerging plan can remove this designation.

Similarly, when adopting an emerging neighbourhood plan, it is expected that its policies should be in general conformity with the strategic policies already contained within the development plan.[72] However, Holgate J has stated that the expectation is that the emerging neighbourhood plan should 'as a whole' be in general conformity, rather than each individual policy being so.[73] Therefore, it is possible that an emerging neighbourhood plan containing a policy inconsistent with existing allocations could be adopted. In such a scenario, section 38(5) of the PCPA 2004 makes clear that the policy included in the most recent addition to the development plan will take priority. Therefore, land may lose an allocation that is protecting a mutual self-interest common (such as allocation for recreation or LGS designation) if that allocation formed part of the existing development plan, and a new neighbourhood plan sought to override it.

[69] *National Planning Policy Framework* n6 [22].
[70] *National Planning Policy Framework* n6 [99].
[71] Town and Country Planning (Local Planning) (England) Regulations 2012, regulation 8(5).
[72] Town and Country Planning Act 1990, schedule 4B para 8(2)(4), which applies to neighbourhood development plans as a result of the Planning and Compulsory Purchase Act 2004, s38A(3).
[73] *R (Crownhall Estates) Ltd v Chichester District Council* [2016] EWHC 73 (Admin) [29].

Finally, the determination of planning applications can defeat or undermine land allocations. As already noted, planning applications should be determined in accordance with the development plan,[74] and with regard to any post-examination neighbourhood development plan,[75] unless material planning considerations indicate otherwise. Case law has demonstrated that local planning decision-makers can, and do, depart from the development plan. [76] Those departures may cause land to be put to a use that is inconsistent with the mutual self-interest common, preventing the community from continuing to use it as such.

On the whole, land allocations made through the planning regime do not exhibit the perpetuity and intergenerational equality characteristic. The ability to remove allocations prevents those allocations continuing perpetually, leaving future generations unable to benefit from the allocation in the same manner as their predecessors.

Exclusion of non-members

Land allocations made through the planning regime also do not exhibit the exclusion of non-members characteristic. A community has no exclusory powers because, unlike the other regulatory schemes examined in this project, planning allocations do not confer use rights on the community. As such, there are no rights that need protecting through the power to exclude others from the land.

The only way in which a community may be able to exercise some, albeit very limited and indirect, exclusory power is to negotiate a shared-management agreement with the landowner. The landowner would still enjoy the exclusory powers, but may exercise them after consultation with the community, and in accordance with its wishes. The use of shared-management agreements is considered further in the context of the

[74] Town and Country Planning Act 1990, s70(2)(a) read together with the Planning and Compulsory Purchase Act 2004, s38(6).
[75] Inserted into the Town and Country Planning Act 1990, at s70(2)(aza), by the Neighbourhood Planning Act 2017, s1, as brought into force by The Neighbourhood Planning Act 2017 (Commencement No. 1) Regulations, regulation 2a.
[76] *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447 (interpreting section 18A of the Town and Country Planning (Scotland) Act 1972, which is the provision in Scottish law identical to the Planning and Compulsory Purchase Act 2004, s38(6)), as recently reinterpreted by Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd and another* [2017] UKSC 37 [8].

idiosyncratic regulation characteristic, and those observations shall not be repeated here. In short, as there is no obligation on a landowner, whether public or private, to engage in shared management, and the community itself has no direct exclusory power, the exclusion of non-members characteristic is not exhibited.

Mutual self-interest

The mutual self-interest characteristic requires the resource to be managed in the interests and for the benefit of a community, without any concern for the interests of the wider public. To that end, the purpose of land allocations, and especially those made in a neighbourhood plan, is to set aside land for a particular use, or to satisfy a particular need, that the specific community within the plan area may have for it. Therefore, when allocating land, the concern is not for the public at large, but rather for the discrete community that falls within the local or neighbourhood plan area.

The community focus is evident in the policy guidance surrounding LGS designation. The PPG explains that LGS designation 'provide[s] special protection against development for green areas of particular importance to local communities',[77] and may be used where green spaces are 'demonstrably special to the local community, whether in a village or in a neighbourhood in a town or city.'[78] Furthermore, the NPPF provides that '[l]ocal communities through local and neighbourhood plans should be able to identify and protect green areas of particular importance to them',[79] and that LGS designation should only be used when 'the green area is demonstrably special to a local community and holds a particular local significance'.[80]

However, notwithstanding the community focus of land allocations, it is arguable that the land is not 'just as private to the community as private property is to the private property owner',[81] and the mutual self-interest characteristic not exhibited. This argument can be made in three ways.

[77] *Planning Practice Guidance* n34 [005] Reference ID 37-005-20140306.
[78] *Planning Practice Guidance* n34 [009] Reference ID 37-009-20140306.
[79] *National Planning Policy Framework* n6 [99].
[80] *National Planning Policy Framework* n6 [100].
[81] Clarke n40 329.

First, whilst allocations are made with the interests of a community in mind, the effect of allocating land is to protect the land for the benefit of the public generally. As such, the land takes on the appearance of an open-access common, not a mutual self-interest common. For example, designating land as LGS has the effect that the land should be considered as Green Belt.[82] Therefore, LGS designation confers a practical benefit on the public at large, as opposed to the relevant community specifically; Green Belt status makes it difficult to construct new buildings on the land, and the public benefits from the bar on development and the preservation of open space.

Second, whilst land is allocated according to a community's interest, the absence of any use rights being conferred, and any power to exclude, ensures that the community does not enjoy a practical benefit above that enjoyed by the public generally. Allocation does not place the community in a privileged position as against all others, and therefore the resource cannot be described as being private to the community. Similarly, as noted earlier, unless a landowner voluntarily grants use rights to a specific community, use rights will likely be granted by statute, which confer rights on the public generally.

Third, as also noted earlier, Stanton argues that neighbourhood planning suffers from centralism.[83] Therefore, whilst the neighbourhood planning provisions are intended to give effect to localism in so far as they allow a community to shape the use of local resources, these powers are qualified as they can only be used in a way that is consistent with the strategic needs of the wider local area.[84] Therefore, allocations made at neighbourhood plan level are not made with exclusive regard to the interests of a discrete community, but with regard to the interests of the wider local plan area. Furthermore, at local plan level, policies are driven by conformity with the NPPF, the PPG and any ministerial statements and additional policy guidance. As such, allocations of land are not made exclusively with the interests of the community in mind, but with consideration given to outside influences.

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[82] *Planning Practice Guidance* n34 [020] Reference ID 37-020-20140306.
[83] n26.
[84] See also G Parker, 'Neighbourhood Planning: Precursors, Lessons and Prospects' [2012] 13supp *Journal of Planning and Environment Law* OP139, OP141 citing [184] of the NPPF (March 2012 version).

In summary, at first glance, land allocations, and especially those made in a neighbourhood plan, appear to exhibit the mutual self-interest characteristic. However, on closer inspection, it is clear that land may be allocated pursuant to considerations other than just the interests of the mutual self-interest community. Furthermore, allocations deliver benefits to the public generally, not just the community. As such, the mutual self-interest characteristic is not exhibited.

Homogeneity of interest

Almost any allocation of land can, at least in theory, be made. Therefore, there is a wide range of interests that may be advanced through land allocations. The likelihood of there being competing and disparate interests is greater in the context of local plan-making as opposed to neighbourhood plan-making, as the geographical area covered by the local plan is wider, and will encompass different communities with their own discrete concerns. To that, end the NPPF anticipates homogeneity of community members' interests in the neighbourhood planning context, and states that '[n]eighbourhood planning gives communities direct power to develop a shared vision for their neighbourhood'.[85]

Nonetheless, the availability of such a wide range of possible allocations does not preclude land allocations, whether in the local or neighbourhood plan, exhibiting the homogeneity characteristic. Three features of land allocations enable the exhibition of the characteristic.

First, the nature of the interest enjoyed by each community member is the same. Community members all enjoy rights that are enforceable as a matter of public law, which cause a planning decision-maker to incur duties when making decisions about the land and determining planning applications.

Second, allocations of land are made for a specific purpose. Therefore, the 'content' of community members' interests once allocations are made are also homogenous.

Third, polices allocating land within a local plan must be supported by reasoned

[85] *National Planning Policy Framework* n6 [29].

justifications,[86] and a neighbourhood plan must be accompanied by a statement that explains the reasons why the plan should be made in the proposed terms.[87] Therefore, even if the content of community members' interests were not initially homogenised, it is likely that the process of preparing a plan promotes homogeneity. For example, LGS designation may occur on the grounds of 'beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of… wildlife'.[88] As such, whilst community members may agree on the designation, the justifications for that designation are not necessarily homogenous. However, the need to produce a written statement justifying the designation requires the community to come together and reach consensus on those justifications, promoting the homogeneity characteristic.

Therefore, land allocations made through the planning system do exhibit the homogeneity of interest characteristic.

Cohesive community

Arguably, community cohesion is exhibited when land allocations are made through the neighbourhood planning process, but is exhibited to a lesser degree at local plan level. Neighbourhood plans are unlikely to come into being without community cohesion, especially where the plan is prepared by a neighbourhood forum. The plan-making process can be long and arduous, with many rounds of consultation with the community, and the need for compliance with the various formalities discussed earlier in this chapter.

To facilitate the community cohesion required to prepare a neighbourhood plan, the TCPA 1990 sets out conditions that an organisation or body must meet before being designated as a neighbourhood forum. In particular, only those who live, work, or are elected members of local government in the neighbourhood area[89] may be a member of a neighbourhood forum.[90] Those requirements limit the size of the community, and

[86] Town and Country Planning (Local Planning) (England) Regulations 2012, regulation 8(2).
[87] Town and Country Planning Act 1990, schedule 4B para 1(2)(b).
[88] *National Planning Policy Framework* n6 [100].
[89] Defined in the Town and Country Planning Act 1990, s61G(1).
[90] Town and Country Planning Act 1990, s61F(5)(b).

smaller groups are more likely to exhibit cohesion. Furthermore, the geographical requirement enhances the likelihood that the community preparing the plan will possess shared experiences and values. The organisation or body must also have a written constitution,[91] which would facilitate a harmonious co-existence amongst its members, as well as require community cohesion to draft. Finally, given that a local planning authority may only designate one neighbourhood forum for each neighbourhood area,[92] the neighbourhood forum is encouraged to exhibit cohesion and assemble a neighbourhood plan, otherwise it is possible that no plan will be assembled for that neighbourhood area, and no land protected through planning allocations. Therefore, it is arguable that, where land allocations are put forward in a neighbourhood plan, the community cohesion characteristic is exhibited.

However, Bogusz raises legitimate concerns concerning community participation in the neighbourhood planning process, which may in turn affect cohesion. In particular, she argues that

> it would be wrong to suggest that [neighbourhood planning] assumes that all the individuals within communities are sufficiently motivated to become involved in the process. This activity requires commitment, time and a willingness to learn about planning, and there is a tendency for certain a "type" of individual to be involved, usually articulate and well-resourced.[93]

If Bogusz is correct, which seems likely, community cohesion may be lacking in the neighbourhood planning process, as not all community members participate. Nonetheless, when community members do participate, the process and requirements of preparing the plan promotes cohesion. Therefore, those community members who participate in the plan-making process can be described as cohesive and, as such, the characteristic is exhibited to some degree.

Local plan-making does not exhibit the same degree of cohesiveness as the neighbourhood planning process, as it is the local planning authority that both prepares and makes the plan. As such, a local plan does not require co-ordinated community

[91] Town and Country Planning Act 1990, s61F(5)(d).
[92] Town and Country Planning Act 1990, s61F(7)(c).
[93] B Bogusz, 'Neighbourhood Planning: National Strategy for Bottom up Governance' (2018) 10(1) *Journal of Property, Planning and Environment* 56, 61.

involvement; whilst a community may choose to make collective representations to a local planning authority, it is not necessary for them to do so, and individuals from within a community may make their own representations independent of the views and actions of others. A such, land allocations put forward at local plan level only weakly exhibit community cohesion, if at all.

Idiosyncratic regulation

Allocations made through the planning system do not transfer title to the land to the community, nor do they confer any hard-edged rights over the resource. As such the landowner retains responsibility for the management of the resource,[94] and it is they who decide how and by whom the resource may be used, subject to any enforceable third-party rights.

Nonetheless, there is some, albeit limited, scope for the community to participate in the management of the land. For example, as was suggested in the context of TVGs in chapter seven, where a community has an interest in land, the landowner may voluntarily consult the community when managing it. Indeed, the PPG expressly considers the possibility of landowners engaging with the local community when managing LGS land.[95] The PPG also suggests that the community should consider how it could be involved in the management of the resource with the landowner's agreement, especially where features that make the green space locally significant need to be conserved.[96] It is possible that the community could be represented in the shared-management agreement by a specialist interested organisation, such as the Open Spaces Society, through a community-led initiative, such as a working group, or simply through landowners engaging in consultation with the relevant community. However, irrespective of which avenue is adopted, consultation is voluntary, and the results non-binding, with the wording of the PPG reinforcing that the role of the community is merely consultative. Therefore, a community may propose a scheme of regulation that fits with developed idiosyncratic practices, but these proposals will not bind the landowner.

[94] *Planning Practice Guidance* n34 [021] Reference ID 37-021-20140306.
[95] *Planning Practice Guidance* n34 [017] Reference ID 37-017-20140306.
[96] *Planning Practice Guidance* n34 [021] Reference ID 37-021-20140306.

The idiosyncratic regulation characteristic is also concerned with a community's ability to develop rules regarding its use of the land, and not just its wider management. For example, communities must be able to regulate when and how the land is used by its members. A community may devise such rules, although, in the context of planning land allocations, two inhibiting factors exist.

First, allocation of land does not confer any use rights. Therefore, if a community does not enjoy use rights over the land, it is unable to develop rules regarding its use.

Second, even if a community does enjoy use rights independent of any allocation, and develops idiosyncratic rules regarding that use, the enforceability of those rules is problematic. Unless those rules were grounded as legal obligations incumbent upon each community member, they would be worthless, and at the mercy of members' voluntary compliance. However, the introduction to this project ruled out the use of a series of private contracts between community members as a method of securing such obligations. The only other obvious mechanism by which community members may be bound to a scheme of regulation is if the community has formalised its relationship and adopted one of the corporate forms examined in chapters four and five of this project. If that formalisation has occurred, the exhibition of the idiosyncratic regulation characteristic would be determined by the degree to which the corporate form exhibits the characteristic. Nonetheless, it is still only the community members' use that is regulated, not the resource as a whole.

In summary, in the absence of any rights or powers over the land, the community is unable to develop binding idiosyncratic regulation regarding its use or management. At best, the landowner may voluntarily consult the community regarding the management of the land, although the results of that consultation are not binding. As such, land allocations made through the planning system do not exhibit the idiosyncratic regulation characteristic.

Sanctions

The sanctions characteristic contains two limbs: mutual enforcement and the ultimate sanction of exclusion. Neither of these limbs are exhibited by allocations made through the planning regime. The availability and effectiveness of sanctions are inherently linked to the nature of the idiosyncratic regulation, the breaches of which those sanctions seek to remedy. As it was concluded that land allocations made through the planning system do not exhibit the idiosyncratic regulation characteristic, it follows that the sanctions characteristic is also not exhibited.

The use of private contracts is discounted as a method of securing idiosyncratic regulation, partially because of the inadequacy of the remedies for breach of contract in the context of the sanctions characteristic.[97] If, in the alternative, idiosyncratic regulation is secured by the community adopting one of the corporate forms examined in chapters four and five, the exhibition of the sanctions characteristic is dependent on the degree to which that ownership vehicle exhibits the characteristic. As such, any exhibition of the characteristic has nothing to do with the planning regime itself, and the regime does not exhibit the sanctions characteristic.

IV. CONCLUSION

Relying on the planning regime, and specifically allocations of land in the development plan, to secure a mutual self-interest common is problematic. Whilst the development plan informs how land may be used, the protection offered by allocations is limited, and littered with shortcomings. The most notable of those shortcomings is the planning regime's failure to confer any rights on a community to use the land for the purpose for which it is allocated. Consequently, even if land is allocated for community use, use rights must be sourced from elsewhere, with no guarantee that they would be forthcoming, or what the nature of those rights would be.

The planning regime's failure to confer hard-edged rights on the community is largely responsible for its failure to exhibit the eight characteristics of a mutual self-interest

[97] 'Introduction' pp35-36.

common. In particular, as a community enjoys no rights over the resource, it also lacks the exclusory powers necessary to prevent interferences with those rights. Furthermore, in the absence of enjoying any rights over the land, the community has no right to impose a scheme of idiosyncratic regulation over the land, or sanction breaches of that regulation. Finally, as a community does not enjoy any rights over the land, it is not in a more privileged position than all others regarding the resource, even though the allocation may have been made with the community in mind. As such, the resource is not managed exclusively for the community to the exclusion of all others, and the mutual self-interest characteristic is not exhibited.

Overall, allocations made in the development plan allow communities to do little more than help guide development in the local area. As such, of the regulatory schemes examined in this project, the planning regime is the least satisfactory in securing a mutual self-interest common. At the very least, if a community cannot hold title to a resource, it should enjoy enforceable rights over it, securing the community's interest. Therefore, the planning regime, and specifically allocations made in the development plan through either the mechanism of local or neighbourhood planning, do not secure a mutual self-interest common.

Chapter 9 | CONCLUSION

This project has examined the institutions available in English law to determine whether they facilitate the existence of mutual self-interest commons. The project answers the call made by Clarke in her 2006 study, in which she remarked

> [l]egal rules have the potential to both facilitate and discourage the development of successful commons. We need to look more closely at our legal institutions to ensure they are doing the former and not the latter.[1]

The institutions examined in this project can be divided into two categories: ownership vehicles and regulatory schemes. Ownership vehicles circumvent the rule that only legal entities may hold title to land, and the fact that a community is not a legal entity, enabling a community to hold title to land by the 'back door'. If a community has formalised its relationship and adopted an ownership vehicle, community titleholding is facilitated. Conversely, regulatory schemes embrace a community's inability to hold title to land, and instead confer rights on a community over land held by a third party.

This chapter shall first identify the conclusions that can be drawn from this project, including the original contribution made to the scholarship. It will then identify the key themes that have emerged throughout the project, its limitations, and future avenues of research. Overall, the conclusion of this project is that, notwithstanding the desirability of communal property, and mutual self-interest commons specifically, there is no legal institution that can be used to satisfactorily secure such an arrangement.

I. CONCLUSIONS

This project can be split into three sections: first, a justification of the commons, and mutual self-interest commons specifically, including the identification of the key characteristics of those commons (chapter one); second, an assessment of the extent to which ownership vehicles exhibit the required characteristics (chapters two to five);

[1] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' (2006) 59(1) *Current Legal Problems* 319, 357.

third, an assessment of the extent to which regulatory schemes exhibit the required characteristics (chapters six to eight).

Mutual self-interest commons

The introduction to this project establishes four things. First, the tragedy of the commons thesis is flawed; common-property is in fact an important species of property, which English law should facilitate. Second, the term 'commons' refers to all those property regimes that do not involve individual private ownership (limited-access commons, open-access commons, state property and no-property). Third, of those regimes, the focus should be on facilitating a specific sub-species of limited-access common, known as the mutual self-interest common. Fourth, mutual self-interest commons exhibit eight key characteristics: inalienability, perpetuity and intergenerational equality, exclusion of non-members, mutual self-interest, homogeneity of interest, community cohesion, idiosyncratic regulation and sanctions for breaches of that regulation.

If a legal institution is to promote, or at least facilitate, mutual self-interest commons, it must exhibit the eight required characteristics. As such, the characteristics are the metric against which institutions should be assessed to determine whether they may be used to secure a mutual self-interest common. The rest of the project undertakes that assessment.

Ownership vehicles

Chapter two established that the private trust only convincingly exhibits one characteristic of a mutual self-interest common (the mutual self-interest characteristic), whilst exhibiting the exclusion of non-members, homogeneity of interest and idiosyncratic regulation characteristics to a limited degree. The primary reason why the trust does not exhibit all eight characteristics is because the trust functions as a wealth management device, with a focus on preserving the value of trust property, as opposed to the asset itself.

Chapter three established that unincorporated associations, whilst underpinned by the private trust, exhibit more of the eight characteristics than the private trust. Specifically,

as well as exhibiting the mutual self-interest characteristic, unincorporated associations also exhibit the community cohesion, idiosyncratic regulation and sanctions characteristics as a result of their contractual rules of association. The failure to exhibit the remaining characteristics can be attributed to unincorporated associations' reliance on the bare trust for their titleholding ability, which imports the limitations of the private trust into its analysis.

Chapter four established that companies may exhibit up to seven of the required characteristics. Exclusion of non-members is exhibited to a limited degree, as is the mutual self-interest characteristic.[2] However, the exhibition of the inalienability, homogeneity of interest, community cohesion, idiosyncratic regulation and sanctions characteristics are all dependent on the drafting of a company's constitution. In comparison to a trust, a company has enormous flexibility to determine its functions and internal workings through its constitution; whilst the terms of a trust are also dependent on the drafting of a trust instrument, the legal relationship and functioning of a trust are heavily prescribed. However, the company's flexibility and lack of prescription is also a weakness, as it ensures that the exhibition of the characteristics in any given company cannot be guaranteed.

Finally, chapter five established that, as a corporate form, registered societies exhibit the eight characteristics in a similar fashion to companies.[3] A registered society's exhibition of the characteristics will depend on the constitution of the particular society, with the flexibility in its constitution again being both a strength and a weakness. However, notwithstanding the similarities between companies and registered societies, it is argued that the company is a more suitable mechanism for securing a mutual self-interest common. Registered societies are restrictive; they must carry on an 'industry, business or trade',[4] do not enjoy a legal framework codified to the same extent as companies, and do not have a species of society equivalent to the guarantee company, which can overcome some of the difficulties experienced in the exhibition of the inalienability characteristic.

[2] The exhibition of the mutual self-interest characteristic is described as limited because of the additional hurdles faced by the community interest company in the exhibition of the characteristic.
[3] With the exception of the exclusion of non-members characteristic, which, it was argued, is not exhibited.
[4] Co-operative and Community Benefit Societies Act 2014, s2(1).

Overall, it is argued that, whilst it is far from perfect, the company is the ownership vehicle with the greatest potential to secure a mutual self-interest common. Whether a company is successful in doing so will depend on the drafting of its constitution but, subject to that appropriate drafting, the company can be made to work in the absence of a legal institution designed specifically for the purposes of community titleholding.

Regulatory schemes

Chapter six established that the commons registration scheme exhibits both the homogeneity of interest and community cohesion characteristics. In addition, the inalienability, idiosyncratic regulation and sanctions characteristics are exhibited to some degree. The primary reason for the failure to exhibit the remaining characteristics, and especially the exclusion of non-members and mutual self-interest characteristics, is the fact that regulatory schemes only confer rights over the communal resource, as opposed to transferring title to the community.

Chapter seven established that the town and village green regime only convincingly exhibits the inalienability characteristic, whilst also exhibiting the homogeneity of interest and community cohesion characteristics to a limited degree. As with the commons registration scheme, the failure to exhibit the remaining characteristics can largely be attributed to the absence of titleholding by the community, although there are other technical reasons as well.

Finally, chapter eight established that the planning regime exhibits the inalienability and homogeneity of interest characteristics, whilst also exhibiting the community cohesion characteristic to a limited degree.[5] Two overarching reasons prevent the exhibition of the remaining characteristics. First, as with the other regulatory schemes, title to the communal resource is not transferred to the community. Second, unlike the other regulatory schemes, the planning regime does not confer hard-edged property rights on a community. As such, the community does not enjoy an entitlement to the communal resource above and beyond that enjoyed by the public generally.

[5] The exhibition is described as limited as allocations made by a neighbourhood development plan better exhibit the community cohesion characteristic than those made by a local plan.

Consequently, land allocations made through the planning regime are the least effective regulatory scheme for the purposes of securing a mutual self-interest common.

Two points of note arise from chapters six, seven and eight. First, the three regulatory schemes' failure to transfer title to the resource to the community accounts for their failure to exhibit many of the key characteristics. In particular, conferring rights and not title over the resource is insufficient for the exhibition of the exclusion of non-members characteristic, which requires the community to enjoy the exclusory powers of an owner. Similarly, the mutual self-interest characteristic is inhibited as conferring rights short of ownership does not ensure that the resource is 'just as private to the community as private property is to the private property owner',[6] and often the interests of third parties must be considered in the management of the resource. In addition, without the rights of an owner, communities often lack the power to regulate the resource and sanction breaches of that regulation without the co-operation of the landowner.[7]

Second, as compared to the ownership vehicles, it is notable that regulatory schemes better exhibit the inalienability characteristic.[8] Curiously, it is the failure to transfer title that allows the exhibition of the characteristic, as the rights conferred by the regulatory schemes attach to the land and survive alienations of the title. In comparison, in an ownership vehicle, a community's rights to a specific resource are defeated upon alienation. The resource is substituted, and new rights arise over the substituted assets. This project has considered various mechanisms that may prevent substitutions by prohibiting alienations generally. However, none of those mechanisms have proved effective, and the desirability of prohibiting alienations altogether was called into question at the outset of this project.[9] Therefore, in the current legal framework, it seems that the most effective way of securing the inalienability characteristic is to burden the title to the land with the community interest.

[6] Clarke n1 329.
[7] The notable exceptions to this observation are commons regulated by commons councils pursuant to the Commons Act 2006.
[8] However, the planning regime only exhibits the second limb of the characteristic because it fails to confer hard-edged property rights on the community.
[9] 'Introduction' pp23-24.

Original contribution

By extending, refining and updating Clarke's 2006 study, this project makes three original contributions to the scholarship on mutual self-interest commons.

First, by drawing together established commons scholarship, this project has offered eight key characteristics of a mutual self-interest common. Whilst already present in the scholarship, this project refines and justifies those characteristics, and presents them as an overarching model for mutual self-interest commons.

Second, this project considers a wide range of legal institutions that may be used to secure mutual self-interest commons. Clarke considered the trust, companies, commons registration and village green registration. Whilst this project also considers those institutions, the study was extended to consider unincorporated associations, co-operative and community benefit societies, and planning law. As such, this project offers previously unconducted analysis on legal institutions that may be used to secure a mutual self-interest common.

Third, whilst considering those institutions also considered by Clarke, this project updated her study to include new law, such as the Companies Act 2006, whilst also expanding the analysis. Therefore, this project offers greater depth of analysis than that offered by Clarke, whilst also modernising the analysis to reflect the current legal landscape, both contributing to the scholarship on commons.

II. EMERGING THEMES

Throughout this project many technical reasons have been raised as to why the institutions analysed do not satisfactorily facilitate and secure mutual self-interest commons. However, alongside these technical reasons, some key themes emerged, which are repeated across several of the institutions analysed. Those themes are the categorisation of resources as wealth, the endurability of the institutions examined and the existence of a private-public spectrum.

Resources as wealth

It was noted above that regulatory schemes better exhibit the inalienability characteristic than ownership vehicles. However, as they do not transfer title to the resource to the community, regulatory schemes generally perform worse than ownership vehicles in the exhibition of all other characteristics. Therefore, if ownership vehicles can better exhibit the inalienability characteristic, it is arguable that they present a more satisfactory means of securing mutual self-interest commons than regulatory schemes. As such, the question arises as to why ownership vehicles do not exhibit the inalienability characteristic, and what can be done to reverse that trend.

The theme that emerges from chapters two to five is that ownership vehicles tend to view the resources held in that institution as wealth, rather than valuing their intrinsic qualities as things.[10] Consequently, the ownership vehicles are more concerned with preserving the financial value of the communal resource, rather than the resource itself, ignoring the community connection to that specific resource. For example, it was noted in chapter two that overreaching, which enables the transfer of trust assets free of beneficiaries' interests, whilst transferring that interest into the sale proceeds, values the trust property only as wealth. The doctrine has no regard for the beneficiaries' connection to the trust property itself, and secures their connection only to its financial value. Even if the beneficiaries have established other interests over the trust property that acknowledges the property's intrinsic value as a thing, such as the overriding interest of persons in actual occupation, those interests can still be overreached.[11] Similarly, it was noted in chapters four and five that asset locks, which seek to ensure that assets remain within a corporate form and are used for the purpose(s) of that corporation, also only ensure that the value of the asset remains within the corporation, as opposed to the asset itself.

Reflecting the above, Rudden argues that, in any co-ownership situation, the resource is never treated as a thing, but instead as wealth. The resource can always be alienated, and the trade-off is that the purchase price is paid into safe hands, preserving its value

[10] See B Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81 on the distinction.
[11] *City of London Building Society v Flegg* [1988] AC 54. See 'Trusts' p44.

for the co-owners.[12] Therefore, for an ownership vehicle to successfully secure a mutual self-interest common, that treatment and understanding of the communal resource must be reset, and the resource valued for its own inherent qualities as a thing. How that reset could be achieved is unclear, although it is likely that it would require a complete overhaul of the legal frameworks governing the ownership vehicles, the viability of which would need to be considered.

Endurability

No institution examined in this project exhibited the perpetuity and intergenerational equality characteristic. The characteristic requires that any legal institution used to secure a mutual self-interest common must be capable of protecting the perpetual existence of the resource and the communal rights that exist over it. Protecting the resource and communal rights ensures that future generations of community members are able to derive a benefit from the resource in the same way as their predecessors, and secures an intergenerational equality of benefit.

The examined ownership vehicles fail to exhibit the characteristic as each may be terminated. Consequently, the community's formalised legal relationship, which enables it to hold the title to land, is brought to an end, as are the communal rights enjoyed in that relationship. Similarly, the rights conferred by regulatory schemes may be terminated. Registration of land as a common or village green and planning allocations may be reversed, removing the rights enjoyed by the community under those schemes.

The failure to exhibit the perpetuity and integrational equality characteristic is unsurprising. Property law is suspicious of arrangements that tie up property indefinitely without any prospect of that property holding being undone. The mortmain rules in the Statutes of Mortmain of 1279 and 1280, as well as the inalienability and perpetuity rules contained in more recent statutes, such as the Perpetuities and Accumulations Act 2009, evidence that suspicion.

[12] Rudden n10 84.

Therefore, given the wholesale failure to exhibit the perpetuity and intergenerational equality characteristic, and the suspicion shown towards arrangements that would secure the characteristic in its presented form, it is necessary to further refine the characteristic. To that end, it is suggested that the characteristic should have two limbs. First, it must be possible for the institution used to secure the mutual self-interest common to exist in perpetuity, even if it does not in fact do so. Second, mechanisms that may be used to terminate the institution must be subject to rigorous control, and implemented infrequently. As such, the proper test for perpetuity and intergenerational equality should be the ease with which the institution may be terminated, not whether it can in fact be terminated.

In light of the suggested refinements, it is arguable that the company is the ownership vehicle that best exhibits the perpetuity and intergenerational equality characteristic. Corporate personality ensures perpetual succession, and the winding up and dissolution of companies is tightly controlled by the Insolvency Act 1986. The characteristic would be better exhibited if members' voluntary winding up and a company's ability to apply for removal from the register of companies[13] did not exist. Nonetheless, the company is still the ownership vehicle that best exhibits the characteristic. In comparison, whilst also enjoying corporate personality, registered societies may be terminated through additional mechanisms, such as suspension and cancellation of registration. Furthermore, the trust, and consequently the unincorporated association, are subject to the technical common law and statutory perpetuity rules, which prevent their perpetual existence, and the exhibition of the first limb of the characteristic.

The regulatory scheme that least satisfactorily exhibits the refined characteristic is the planning regime. Whilst land allocations are long term in outlook and should endure beyond the local or neighbourhood plan period,[14] there will inevitably come a time when the allocation is out of date, and will carry little or no weight in the planning process. Therefore, arguably, the first limb of the characteristic is not exhibited. Furthermore, even when an allocation is up to date, chapter eight explored the various methods through which allocations may be removed or ignored. Some of those methods

[13] Companies Act 2006, s1003.
[14] Ministry of Housing, Communities and Local Government, *National Planning Policy Framework* (June 2019) [22] and [99].

appear easy to implement; for example, land may simply be re-allocated by an emerging local or neighbourhood plan.

In contrast, registration of land as a common or village green may continue indefinitely, exhibiting the first limb of the characteristic. Nonetheless, those registrations may be brought to an end through various statutory mechanisms. In addition, some common law methods exist by which rights of common may be extinguished,[15] which do not apply to village green rights. Therefore, as there are fewer mechanisms by which village green rights may be extinguished, it is arguable that the village green regime is the regulatory scheme that best exhibits the refined perpetuity and intergenerational equality characteristic.

Private-public spectrum

Finally, this project reveals that some institutions are just too 'private' to secure a mutual self-interest common, whilst others are too 'public'. There is very little that occupies the space in between those two extremes, which is unfortunate, as that is the space occupied by the mutual self-interest common.[16]

Arguably, ownership vehicles are too private in outlook. Ownership vehicles confer the rights and powers of an owner on the artificial entity used to hold title to the communal resource. Whilst the artificial entity holds that title on behalf of a community, the community itself does not enjoy the ownership rights. Furthermore, this project shows that the ownership rights of the artificial entity are not sufficiently curtailed or burdened by the community interest to ensure that the ownership vehicle functions in a way that is in fact tantamount to community titleholding. For example, trustees of a trust of land enjoy all the powers of an absolute owner,[17] including the power to alienate the land. When coupled with the doctrine of overreaching, it is arguable that the trust affords too many owner-like rights to the trustees. In addition, beneficiaries' rights of redress are limited, and it is rarely the case that they will recover the asset once it is alienated. Similarly, a company, and not its members, own the

[15] 'Commons Registration' pp179-181.
[16] In the introduction to this project, limited-access commons, including the mutual self-interest common, were equated to communal private ownership: 'Introduction' pp11-13.
[17] Trusts of Land and Appointment of Trustees Act 1996, s6(1).

company's assets. As such, the company may alienate its assets. Such alienations may occur even if they are in breach of an objects clause, and company members are unable to threaten the security of those transactions.[18]

Conversely, regulatory schemes are too public. The extreme example is the planning regime, which confers no rights on the community above and beyond those enjoyed by the general public. The commons registration scheme and the town and village green regime are also too public, as they show an inherent concern for the public interest, although, arguably, they do not sit at the extreme end of the spectrum with the planning regime.

There is very little that occupies the middle ground of the private-public divide. Companies with appropriately drafted constitutions, or commons and village greens subject to a modified statutory scheme, have the potential to occupy the void. However, as long as ownership vehicles enable the artificial entity holding title to do owner-like things at the expense of the community, and regulatory schemes have an inbuilt public interest concern, none of those legal institutions will satisfactorily occupy the middle of the private-public spectrum.

The suitability of the key characteristics

In light of the themes identified, and the failure of any single legal institution exhibiting the required characteristics of a mutual self-interest common, the question arises as to whether it is in fact the institutions that are found wanting, or the required characteristics themselves. After all, it has become clear throughout this project that some of the examined institutions, such as some species of the corporate form, can be made to work for the purposes of securing a mutual self-interest common, and that the imperfections of those institutions arise only when they are measured against the metric of the eight required characteristics.

It is possible that the tension between the characteristics and the examined legal institutions arises from the characteristics not capturing adequately the necessary features of modern urban commons primarily concerned with the provision of

[18] Companies Act 2006, s39.

recreation and amenity space, as opposed to traditional commons that support agriculture, local economies and the provision of essential natural produce for communities. It is perhaps the case that modern and traditional commons have their own distinct requirements, and that a blanket analysis of required characteristics cannot be made to fit all purposes that commons serve.

Furthermore, many of the works referred to in the introduction to this project and used to establish the eight required characteristics are either older sources of scholarship concerned with traditional commons, or newer sources relying on the established rhetoric without evaluating its accuracy. Private property narratives dominate property scholarship, and the established commons framework is less tested than its private property counterpart. However, commons scholarship is becoming more prevalent, especially given the problem of decreasing private amenity space and high-density house building identified by this project. As that scholarship develops, and the context of modern urban commons becomes the dominant focus of the scholarship, the understanding of the suitability of the eight required characteristics and their application to modern urban commons will be better understood.

Modern urban commons: the necessary characteristics

It notable that no institution examined in this project exhibited the perpetuity and intergenerational equality characteristic. The wholesale failure of any institution exhibiting the characteristic may indicate that the characteristic is itself flawed by setting too high a bar and being too rigorous in the standard that it requires. Refinements to that characteristic are outline above, and place emphasis on limiting the ease with which the institution may be terminated, rather than insisting upon an inability to terminate. Further, it is also noted above that lowering the bar in such a way enables some ownership vehicles and regulatory schemes to better exhibit the characteristic, perhaps even to a satisfactory degree.

It is difficult to justify the application of the traditional understanding of the perpetuity and intergenerational equality characteristic to modern urban commons. In particular, it is difficult to find a convincing and coherent reason for prohibiting the termination of the legal institution and communal arrangement where that common provides

recreation and amenity space as compared to a common that is used for more traditional purposes. Where a common is used for agriculture, to support a local economy or for the sustenance of a community, there is a clear link between the survival of the community (and its members) and the common. Conversely, where a common is used as amenity space, the link between the survival of a community and the common is less clear, perhaps even tenuous. Whilst the amenity space is desirable for a community, and may feed into community wellbeing and community members' inclination to remain community members, the physical survival of the community and its members is unlikely to be determined by the survival of the amenity space. Therefore, it stands to reason that a modified formulation of the perpetuity and intergenerational equality characteristic, as suggested above, should apply to modern urban commons.

Consequently, it is arguable that this project also makes the original contribution of establishing that the perpetuity and intergenerational equality characteristic, as understood in the established common scholarship, is in fact unnecessary to a mutual self-interest common where that common is a modern urban common. Instead, the refined characteristic proposed above better captures the ethos of the characteristic as applied to modern urban commons, and it is that formulation of the characteristic that should be applied as the metric of assessment.

It is also clear that some characteristics cannot, and should not, be refined and deviate from the established concept. For example, both the exclusion of non-members and mutual self-interest characteristics sit at the very heart of a mutual self-interest common. Both of these characteristics must be considered necessary, as losing them would alter the classification of the common.[19] Therefore, it is suggested that these two characteristics form the irreducible core of a mutual self-interest common, irrespective of whether the common is a traditional or a modern urban common.

Finally, it is clear that some characteristics are better described as desirable, as opposed to necessary. For example, the first limb of the inalienability characteristic (alienations defeating communal rights) may be described as desirable rather than necessary as, in

[19] Commons without the exclusion of non-members and mutual self-interest characteristics could not be described as communal private ownership (see 'Introduction' pp11-13). Instead, those commons could not advance any further than open-access commons on the spectrum of property regimes.

effect, prohibiting alienations that defeat communal rights is another mechanism of promoting the perpetuity of the common. However, as has already been identified, it is the ease with which the communal arrangement may be terminated that is in fact of concern, not the prevention of its termination altogether. Therefore, it may be desirable for termination not to occur through an alienation that defeats communal rights, but it may not be necessary to prohibit alienations altogether, especially where such alienations are controlled and subject to the requisite oversight.

Conclusion

The alternative conclusion that may be drawn from this project is that the eight required characteristics of a mutual self-interest common, as identified, are not in fact fit to be the metric against which the legal institutions that may facilitate and secure modern urban commons should be measured. It is clear that some of the examined institutions are workable for the purposes of securing a mutual self-interest common. The imperfections in those institutions arise only as a result of the application of the eight characteristics which, arguably, set a too high and unrealistic threshold. If institutions can be made to work for the purposes of securing mutual self-interest commons, and specifically the modern urban commons with which this project is concerned, arguably the eight rigid characteristics should be reviewed to better reflect the characteristics of those institutions that achieve, albeit imperfectly, the desired ends.

III. PROJECT LIMITATIONS AND CONTINUATION

Limitations

This project, and its findings, are limited in three ways. First, this project is concerned only with the facilitation of mutual self-interest commons. This limitation is justified in the introduction to this project.[20] Limiting the scope of the project in this way has the consequence that the findings of this project should not be applied to commons generally, nor other types of common-property regime. Indeed, it is likely that the other types of common identified in the introduction to this project (open-access, state property and no-property) will have their own idiosyncratic characteristics that must

[20] 'Introduction' pp16-17.

be promoted or facilitated when securing that specific common. As such, it is necessary to distinguish between the types of common, and limit this project and the application of its findings.

Second, this project has proceeded on the basis that modern urban commons are most likely to be concerned with the provision of recreation and amenity space, and the analysis has been conducted through that lens. This assumption is also justified in the introduction to this project.[21] It is accepted that, in a minority of cases, the common may serve other purposes, such as, for example, agricultural purposes. Where a common is not concerned with the provision of recreation or amenity space, the analysis offered in this project may be of limited utility, and would need to be revisited in light of the purpose for which the common is established.

Finally, and linked to the above, this project assumes that the communal resource is land, as opposed to personal property. It will not always be possible to apply the analysis offered in this project to other forms of property. For example, arguments raised regarding the uniqueness of the common and the objections to its substitution, such as those made in chapter two in the context of overreaching,[22] will not apply where the communal resource is a monetary fund. Therefore, where the communal resource is non-unique personal property, the analysis offered in this project is also limited, and would need to be revisited in light of the nature of the communal resource.

Further work

Legal institutions

Three avenues of further work could be pursued. First, in light of the findings regarding ownership vehicles treating resources as wealth, consideration could be given to the ways in which the institutions may be reformed to better value the intrinsic qualities of the resource as a thing. Specifically, the viability and consequences of any reform would need to be considered.

[21] 'Introduction' pp7-8 and pp16-17.
[22] 'Trusts' p47 and pp50-52.

Second, in light of the refined perpetuity and intergenerational equality characteristic, each of the examined legal institutions could be re-examined to assess the extent to which the characteristic is exhibited. In particular, with regard to the second limb of the characteristic, empirical work could be conducted to assess the ease and frequency of the termination of the various institutions.

Third, this project has demonstrated that manipulating private and public law mechanisms to fulfil a role in the middle ground between the two does not produce a successful outcome. Therefore, as the characteristics of a mutual self-interest common have been identified, and it is established that none of the legal institutions currently available facilitate those commons, the natural extension to this project is to set about devising an institution for that specific purpose.

Law of Property Act 1925, s34(2)

As an alternative to devising a new institution, community titleholding could be achieved by amending section 34(2) of the Law of Property Act 1925, and further research could pursue the viability and consequences of that amendment. Section 34(2) stipulates that a maximum of four persons may hold the legal title to land. The limitation came about in the wider context of the 1925 property reforms, which were intended to facilitate conveyancing, and included other limitations such reducing the variety of legal estates that may exist in land. As such, the 1925 legislation is skewed towards prioritising the fungible value of land, and values it as wealth, and not for its intrinsic qualities as a thing.

If section 34(2) was amended to remove the four-person limitation it would, at least in theory, be possible for all community members to hold title to the communal resource. Nonetheless, there appear at be at least three obvious issues with such an amendment, which further research would need to consider.

First, academic research cannot take place in a vacuum, and the practicality of removing or extending the four-person limitation should be considered. For example, removing or extending the limit will inevitably impact upon wider conveyancing

practices, as well as the financing of transactions. In the context of the common itself, questions will arise regarding the mechanisms that should be used to add and remove names from the legal title to reflect fluctuating community membership, and their practicality. Furthermore, the effect of some community members being incapable or unwilling to hold the legal title would need to be explored.

Second, it is unclear how amending section 34(2) to remove the four-person limitation would sit with the current statutory framework. Section 34(2) operates in a wider framework governing co-ownership in English law, and amending one section may have unintended consequences. For example, sections 1(6) and 34(1) of the Law of Property Act 1925 ensure that legal title to land is held as a joint tenancy, not a tenancy in common, with section 36(1) providing that the legal joint tenancy may not be severed into a tenancy in common. Consequently, any dealings with the legal title must be conducted by all joint tenants. However, if sections 1(6), 34(1) and 36(1) applied in their current form to an unrestricted number of legal titleholders, it is difficult to envisage the resource being used productively, as to do so would require the complete co-operation and co-ordination of all titleholders, which may be a vast group. In essence, an anticommons objection arises: when too many people have rights over one thing, nobody can use it, as too many people have a right of veto regarding the use of the resource.[23] Therefore, further research should be conducted into amending section 34(2) through the lens of the anticommons argument, and amendments to the wider statutory framework may need to be considered.

Third, if it is the case that communal right-holding should be more than the class action concept of collective rights,[24] meaning that it must be the community itself that holds the rights, rather than there simply being a collection of individuals with similar discrete rights exercised in common, questions arise as to whether amending section 34(2) will achieve this. In the current legal framework, the legal title is held as a joint tenancy. Therefore, it is arguable that the legal titleholders could in fact be viewed as jointly holding the title, fulfilling the community right-holding requirement. However,

[23] M Heller, 'The Tragedy of the Anticommons: A Concise Introduction and Lexicon' (2013) 76(1) *Modern Law Review* 6.
[24] M McDonald, 'Should Communities Have Rights?' Reflections on Individual Liberalism' (1991) 4 *Canadian Journal of Law and Jurisprudence* 217, 218.

in light of the concerns raised above about the synthesis between an amended version of section 34(2), the current legal framework, and the anticommons, that argument would need to be revisited in light of any amendments made to the wider framework addressing those concerns.

Alternative characteristics

Finally, in light of the alternative conclusion to this project floated earlier in this chapter,[25] further work could be pursued refining the eight required characteristics to determine which are necessary, which are desirable and which are unnecessary, and the form that each should take. The conclusions of this project would provide the foundation of that study, as both the workable institutions and the problematic characteristics are already identified. By examining those institutions that can be made to work for the purposes of securing a mutual self-interest common, and in doing so with the specific context of modern urban commons in mind, the required characteristics and their features and importance may be re-evaluated and modified.

IV. SUMMARY

This project has established three things. First, common-property, and the mutual self-interest common specifically, is, in some cases, a desirable property regime. Second, mutual self-interest commons exhibit eight key characteristics, and any legal institution used to secure such a common must promote, or at least facilitate, the exhibition of those characteristics. Third, none of the legal institutions currently available in English law that may be used to secure a mutual self-interest common do in fact exhibit all eight of the required characteristics. As such, the real tragedy of the commons in English law is that, notwithstanding the desirability of communal property, and mutual self-interest commons specifically, there is, at present, no legal institution that can be used to satisfactorily support such an arrangement.

[25] pp271-274.

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